Supreme Court, U.S.
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No. 08-

IN THE

# Supreme Court of the United States

BOROUGH OF CARLSTADT and
CARLSTADT PLANNING BOARD,

*Petitioners,*

*v.*

TOMU DEVELOPMENT CO., INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The lower court's judgment entered a prior restraint prohibiting Carlstadt municipal officials from speaking on behalf of their municipality on matters of public concern before an independent state agency, the New Jersey Meadowlands Commission; mandated a takeover of the construction permit and zoning approval functions of Carlstadt; voided its zoning and land use ordinances; and removed Carlstadt officials from participation on various official committees dealing with development, thereby denying Carlstadt citizens the right of representation on those committees which is enjoyed by the citizens of the other 13 towns in the District.

The Questions Presented are:

1. Did the lower courts' rulings prohibiting Carlstadt's elected officials from communicating with the New Jersey Meadowlands Commission, an independent state agency, about matters of public concern violate the rights of the citizens of Carlstadt to fair and effective representation as guaranteed by the 1st and 14th Amendments to the United States Constitution ?

2. Did the lower courts' rulings prohibiting Carlstadt's elected officials from communicating with the New Jersey Meadowlands Commission, an independent state agency, about matters of public concern violate the rights of the citizens of Carlstadt to equal protection of the laws as guaranteed by the 14th Amendment to the United States Constitution?

3. Did the lower court violate Carlstadt's right to fundamental fairness and due process as guaranteed by the 14th Amendment to the United States Constitution by or invalidating as in Point 3 without notice to Carlstadt's Zoning and Planning Ordinances despite Carlstadt's good faith attempt to comply with the lower court's previous order?

## PARTIES TO THE PROCEEDINGS

Proceedings in the courts below included the following parties:

Borough of Carlstadt (Defendant/Petitioner)

Carlstadt Planning Board (Defendant/Petitioner)

Tomu Development Co., Inc. (Plaintiff/Respondent)

New Jersey Meadowlands Commission (Defendant/Respondent)

In addition, the following were parties to consolidated trial court proceedings and to a single Appellate Division opinion; however, the appeals were not consolidated:

Borough of East Rutherford

East Rutherford Planning Board

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Borough of Carlstadt and Carlstadt Planning Board respectfully petition for a writ of certiorari to review the judgment of the Superior Court of New Jersey, Appellate Division in this case.

## OPINIONS BELOW

The August 30, 2008 opinion of the Appellate Division of the Superior Court of New Jersey affirming the decision of the trial court, the Law Division of the Superior Court (Pet. App. 3a) is unpublished. The trial court's order (Pet. App. 58a) and opinions (Pet. App. 30a) are also unpublished.

## JURISDICTION

The New Jersey Supreme Court denied discretionary review of this matter by order of January 30, 2009. (Pet. App. 63a) declining to review the judgment of the Superior Court of New Jersey, Appellate Division entered on August 30, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (a).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

**The First Amendment to the United States Constitution provides:**

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the

freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Section 1 of the Fourteenth Amendment to the United States Constitution provides:**

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**N.J.S.A. 13:17-1. provides:**

**Declaration of purpose.** It is hereby declared that there are approximately 21,000 acres of salt water swamps, meadows and marshes which are commonly known as meadowlands, in the lower Hackensack river basin; that extensive portions of this area have so far resisted comprehensive development because of their low elevation, exposure to tidal waters, unfavorable soil composition, and, in some instances, their distribution among many municipalities; that this land acreage is a land resource of incalculable opportunity for

new jobs, homes and recreational sites, which may be lost to the State through piecemeal reclamation and unplanned development; that much of this acreage may be subject to redevelopment under section 3, Article VIII, of the State Constitution; that the orderly, comprehensive development of these areas, due to their strategic location in the heart of a vast metropolitan area with urgent needs for more space for industrial, commercial, residential, and public recreational and other uses, can no longer be deferred; that insofar as meadowlands are State-owned lands they are an asset of the fund for the support of free public schools whose integrity may not be impaired; that while the State, in the name of the people, has an obligation to assert its interests in meadowlands that are clearly State-owned, it has an equal obligation to establish a framework within which private owners may assert their interests and take title to meadowlands that are privately-owned; that these areas need special protection from air and water pollution and special arrangements for the provision of facilities for the disposal of solid waste; that the necessity to consider the ecological factors constituting the environment of the meadowlands and the need to preserve the delicate balance of nature must be recognized to avoid any artificially imposed development that would adversely affect not only this area but the entire State; that it is the purpose of this act to meet the aforementioned needs and

accomplish the aforementioned objectives by providing for a commission transcending municipal boundaries and a committee representing municipal interests which will act in concert to reclaim, plan, develop and redevelop the Hackensack meadowlands; and to safeguard fully the interests of the fund for the support of free public schools, all to the extent and manner provided herein.

**N.J.S.A. 13:17-2. provides:**

**Short title.** Sections 1 through 84, inclusive, of this act shall be known and may be cited as the "Hackensack Meadowlands Reclamation and Development Act."

**N.J.S.A. 13:17-3. provides, in pertinent part:**

**Definitions.** As used in this act, the following words and terms shall have the following meanings, unless the context indicates or requires another or different meaning or intent:

(a) "Commission" means the New Jersey Meadowlands Commission created by this act or any board, body, commission, department or officer succeeding to the principal functions thereof or to whom the powers and duties conferred upon the commission by this act shall be given by law;

**N.J.S.A. 13:17-3.1. provides:**

**References to "Hackensack Meadowlands Development Commission".** On and after the effective date of this act, any reference in any law, rule, regulation, order, contract or document to the "Hackensack Meadowlands Development Commission" shall be deemed to mean and refer to the "New Jersey Meadowlands Commission."

**N.J.S.A. 13:17-6 provides, in pertinent part:**

**Powers.** The commission shall have perpetual succession and shall have the following powers:

(i) To prepare, adopt and implement a master plan for the physical development of all lands, or a portion thereof, lying within the district; and to adopt and enforce codes and standards for the effectuation of such plan;

(k) To establish engineering standards for land reclamation, including the type of fill, drainage and grading, and to promulgate a building code specifying the maximum weight, size and density of all buildings and structures to be placed on any land within its jurisdiction according to the method of reclamation employed and the load-bearing quality of the reclaimed land;

(r) To review and regulate plans for any subdivision or development within the district;

(u) To determine the existence of renewal areas, and to undertake redevelopment projects therein;

**N.J.S.A. 13:17-9 provides, in pertinent part:**

**Master plan; preparation and adoption; contents; amendments; considerations; consultations with state and federal agencies.**

(a) The commission shall prepare, or cause to be prepared, and, after public hearing and pursuant to the procedures hereinafter provided, shall adopt a master plan or portion thereof for the physical development of all lands lying within the district, which plan may include proposals for various stages in the future development of the district. The commission may from time to time, pursuant to the procedures hereinafter provided, and after public hearing, amend said master plan. The master plan shall include a report presenting the objectives, assumptions, standards and principles which are embodied in the various interlocking portions of the master plan. The master plan shall be a composite of the one or more written proposals recommending the physical development of the lands within its jurisdiction

either in its entirety or a portion thereof which the commission shall prepare after meetings with the governing bodies of the constituent municipalities and affected counties, and any agencies and instrumentalities thereof.

**N.J.S.A. 13:17-11 provides:**

**Provisions of master plan for location and use of buildings, structures and facilities; land use; codes and standards**

(a) The master plan shall include provisions or criteria for the location and use of buildings, structures, facilities, and land for solid waste disposal, and may include provisions for: (1) the use of land and buildings, residential, commercial, industrial, mining, agricultural, park and other like purposes; (2) service-water supply, utilities, sewerage, and other like matters; (3) transportation, streets, parking, public transit lines and stations both above and below ground level, freight facilities, airports, harbors, channels, docks and wharves, and other like matters; (4) housing, residential standards, clearance, redevelopment, rehabilitation, conservation, and other like matters; (5) water, forest, soil conservation, flood control, and other like matters; (6) public and semipublic facilities including but not limited to civic centers, schools, libraries, parks, playgrounds, fire houses, police buildings, hospitals, and other like matters;

(7) the distribution and density of population; (8) planned unit development; (9) community appearance; (10) financing and programming capital improvements; (11) and other related elements of growth and development, including the social implications of any proposed development, and advances in technology related to any subject included in the plan.

(b) The plan may also include codes and standards covering land use, comprehensive zoning, subdivisions, building construction and design, housing, and the control of air and water pollution and solid waste disposal which has been approved by the State Department of Health, and other subjects necessary to carry out the plan or to undertake a workable program of community improvement. No codes or standards concerning building construction and design shall be promulgated without the certificate of the chief engineer or equivalent official of the commission that the proposed codes and standards meet the engineering standards adopted by the commission. No municipality shall enact or enforce any code which is inconsistent with the code contained in the master plan insofar as such code applies to property within the district; provided, however, that the governing body or other appropriate body of each constituent municipality may enact zoning ordinances and any other codes or standards, which it is authorized by the laws of this State

to enact, for lands within the boundaries of said municipality which are subject to the jurisdiction of the commission and which will effectuate the purposes of the commission's master plan.

**N.J.S.A. 13:17-13 provides:**

**Subdivisions and land development; review and regulation by commission; standards.** The commission shall review and regulate subdivisions and land development within the district, in accordance with procedures and engineering and planning standards adopted by resolution, which shall require that:

(a) All subdivisions, site plans, buildings and other development be in accordance with the master plan and any applicable redevelopment plan;

(b) Adequate drainage facilities and easements be provided;

(c) Road improvements be provided for subdivisions or sites where necessary to protect the safety and convenience of the traveling public, such improvements to include, but not be limited to, additional rights-of-way or pavement widths, marginal access streets, reverse frontage and highway and traffic design features necessitated by increased traffic, potential safety hazards or traffic flow impediments caused by the subdivision or development;

(d) Public water and sewer systems be provided where necessary to protect public health and to insure an adequate supply of water;

(e) Performance guarantees, maintenance bonds and agreements be provided specifying minimum standards of construction for required improvements by the commission and not to exceed the full cost of the facility and installation thereof or the developer's proportionate share thereof. Any bonds, moneys or guarantees received by the commission under this paragraph shall not duplicate bonds, moneys or guarantees required by municipalities for municipal purposes.

**N.J.S.A. 13:17-7 provides in pertinent part:**

**Establishment and organization.**

(a) There is hereby established a Hackensack Meadowlands Municipal Committee, the membership of which shall consist of the mayor or elected chief executive, or his designated alternate, of each constituent municipality.

(b) A majority of the membership of the committee shall constitute a quorum for the transaction of committee business. Action may be taken and motions and resolutions adopted by the committee at any meeting thereof by the affirmative vote of a majority of the full

membership of the committee unless in any case the by-laws of the committee or any of the provisions of this act shall require a larger number. The committee shall elect from its membership a liaison-committee consisting of 4 members, 2 of whom shall be residents of Bergen county and 2 of whom shall be residents of Hudson county. It shall be the purpose of the liaison-committee to act as liaison between the commission and the committee.

(c) The committee shall meet regularly as it may determine, and may also meet at the call of the chairman of the commission.

(d) The committee shall appoint a chairman from among its members and such other officers as may be necessary. The committee may, within the limits of any funds appropriated or otherwise made available to it for this purpose, also appoint, retain and employ, without regard to the provisions of Title 11, Civil Service, of the Revised Statutes, such officers, agents, employees and experts as it may require, and it shall determine their qualifications, terms of office, duties, services and compensation.

(e) Members of the committee shall serve without compensation, and each member shall serve only so long as he is the mayor or elected chief executive of the municipality he

represents. The committee may reimburse its members for necessary expenses incurred in the discharge of their duties.

**N.J.S.A. 13:17-8 provides in pertinent part:**

**Powers.**

(a) The commission shall submit to the committee for review, prior to final action thereon, codes and standards formulated by the commission, the district master plan and amendments thereto, development and redevelopment plans, and improvement plans. The commission may also submit to the committee any other matter which the commission deems advisable.

(b) The committee shall review matters submitted to it by the commission pursuant to this section and shall indicate its position in writing to the commission. Failure of the committee to state its position within 45 days of the receipt of any matter so referred to the committee shall be deemed to constitute approval of the proposed action of the commission. Except that, the committee shall have 120 days after receipt of the master plan to state its position, in writing, to the commission.

(c) The commission shall not take any final action on any matter required to be submitted to the committee pursuant to this section,

which matter has been formally rejected by the committee, except by a vote of 5/7 of the full membership of the commission.

(d) The committee may make recommendations to the commission on any matter it deems advisable whether or not such matter was submitted to said committee by said commission.

**N.J.A.C. 5:92-4.2(h) provides in pertinent part:**

(h) If the RDP described in (f) above is less than the precredited need minus the rehabilitation component, the Council shall review the existing municipal land use map for areas that may develop or redevelop. Examples of such areas include, but are not limited to: a private club owned by its members; publicly owned land; downtown mixed use areas; high density residential areas surrounding the downtown; areas with a large aging housing stock appropriate for accessory apartments; and properties that may be subdivided and support additional development. After such an analysis, the Council may require at least any combination of the following in an effort to address the housing obligation:

1. Zoning amendments that permit apartments or accessory apartments;

2. Overlay zoning requiring inclusionary development or the imposition of a development fee consistent with N.J.A.C. 5:93-8; in approving an overlay zone, the Council may allow the existing use to continue and expand as a conforming use, but provide that where the prior use on the site is changed, the site shall produce low and moderate income housing or a development fee; or

3. Zoning amendments that impose a development fee consistent with N.J.A.C. 5:93-8.

## STATEMENT OF THE CASE

Petitioner Borough of Carlstadt ("Carlstadt") is a fully developed New Jersey municipality of about 5,900 residents.

Carlstadt is one of fourteen (14) constituent municipalities in the Hackensack Meadowlands District in New Jersey (the "District"). See N.J.S.A. 13:17-1. 86% of Carlstadt is under the land use jurisdiction of the New Jersey Meadowlands Commission (the "NJMC"), a New Jersey state agency. The District is comprised of about 21,000 acres of salt water meadowlands over which the NJMC essentially exercises all zoning and land use powers, see N.J.S.A. 13:17-6, 9, 11 and 13.

A constituent body of the NJMC is the Hackensack Meadowlands Municipal Committee ("HMMC"). See N.J.S.A. 13:17-7. This entity, consisting of the Mayor of

each of the 14 towns in the District has a statute-based review role in the land use policies and decision of the NJMC. See N.J.S.A. 13:17-8(a) through (d). By virtue of the statute, the Mayor of Carlstadt (or his designee) is a member of the HMMC and represents the citizens of Carlstadt in decisions made by the NJMC.

Respondent's property (the "Tomu Site") is located with the NJMC District. It is an irregularly shaped tract of 26.9 acres located on the Hackensack River in both Carlstadt and East Rutherford. 8.87 acres are wetlands. It is zoned by the NJMC for "Waterfront Recreation" use. The Tomu site is almost 3 miles removed from the schools, parks, recreation facilities and residential portions of Carlstadt and isolated from the rest of Carlstadt by a 600 acre environmental preservation, a large industrial area, 6 lanes of Route 17 (a 55 mile per hour divided highway) and 6 lanes of the New Jersey Turnpike (another 55 mile per hour divided highway), a 48" natural gas transmission pipeline, natural gas storage tanks and the New Jersey Sports and Exhibition Authority's IZOD Arena and Xanadu entertainment and mall project. There is but one access road.

Despite its isolation, and contrary to the NJMC zoning, Respondent sought to build residential housing on the Tomu Site. Without further contact with Carlstadt, Respondent filed this builder's remedy action alleging that Carlstadt failed to provide its "fair share" of "affordable housing" as required by the New Jersey Constitution, see *S. Burlington County NAACP v. Twp. Of Mt. Laurel*, 456 A.2d 390, 92 N.J. 158 (N.J. 1983). It was consolidated for trial with a similar complaint against the Borough of East Rutherford. Shortly thereafter, the

complaint was amended to name the NJMC as a defendant. The case was thereafter tried.

In a written decision the trial court awarded a "builder's remedy" allowing Respondent to build no more than 420 residential units in each municipality, with 80 affordable units in Carlstadt. The trial court also ordered Carlstadt to prepare and submit by February 28, 2006 a plan to meet its affordable housing obligations, called a "Housing Element and Fair Share Plan" and related zoning and planning legislation, ("HE/FSP"). (Pet.App. 33a)

Carlstadt timely submitted a HE/FSP to the trial court for approval based on (1) an overlay zone – the only practical response in light of the fully developed nature of Carlstadt; and (2) senior citizen housing in a now-closed school. Following review of the HE/FSP, the trial court rendered a second written decision concluding that Carlstadt's plan did not comply with its earlier directions. Pet. App. 30a.

The trial court then entered Final Judgment (Pet. App. 22a) which, among other things, suspended all zoning, land use and development ordinances of Carlstadt; appointed a "Mount Laurel Implementation Monitor" to write rules and regulations in lieu of the suspended development ordinances to provide a reasonable opportunity for the creation of affordable housing and to prepare a Housing Element and Fair Share Plan; obligated Carlstadt (and East Rutherford) to adopt the Monitor's rules and regulations as their own land use regulations; vested the Monitor with review and veto power over all applications for

development except for matters within the sole jurisdiction of the NJMC; barred officials of Carlstadt from taking any action in connection with land use within the jurisdiction of the NJMC without the prior approval of the Monitor. The later 2 points divested the powers of Carlstadt as they relate to interaction with the NJMC.

The Appellate Division affirmed the trial court. Pet. App. 1a. The New Jersey Supreme Court denied certification. Pet. App. 63a. This petition followed.

## REASONS FOR GRANTING THE PETITION

That portion of the trial court's judgment, affirmed by the Appellate Division, which prohibits Carlstadt officials from exercising their statutory responsibilities to present their views before the NJMC is unfair and unconstitutional under the 1st and 14th Amendments to the U.S. Constitution.[1]

### 1. THE LOWER COURTS' RULINGS DEPRIVE CARLSTADT VOTERS OF THE EQUAL PROTECTION OF THE LAWS BY PROVIDING LESS WEIGHT TO THEIR VOTE THEN THE VOTES OF CITIZENS OF THE OTHER 13 TOWNS IN THE MEADOWLANDS DISTRICT.

The NJMC controls land use in the Meadowlands District, meaning 86% of Carlstadt. See N.J.S.A. 13:17-

[1] Petitioner also argues that the actions were unconstitutional under Art. 1, ¶6 and Art. 1, ¶18 of the New Jersey Constitution.

11. The NJMC is an independent agency of state, not local, government, making its own decisions based on its statutory mandate, with input from many parties, including the Carlstadt officials. See N.J.S.A. 13:17-8 The lower courts prohibited that input from Carlstadt officials and transferred that responsibility to the Monitor, depriving Carlstadt residents of an elected representative to the HMMC thereby violating their right to equal protection as guaranteed by the 14th Amendment to the United States Constitution.[2]

The Appellate Division justified this official censorship by finding that Carlstadt officials may speak as private citizens. That is not a practical alternative, ignores the statutory mandate denies the citizens of Carlstadt representation on the HMMC, and reduces them to unconstitutional second-class citizens.

The statutes creating the HMMC recognize a right in every constituent municipality, and therefore every voter in each such municipality, of representation on the HMMC. See N.J.S.A. 13:17-7(a). Voters of each of the 13 other municipalities within the District elect a Mayor who, among other things, represents that municipality before the NJMC and the HMMC by virtue of that statute.

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[2] The issue was first raised before the New Jersey Supreme Court through Petitioners' Petition for Certification and Brief in Support of its Notice of Appeal as an issue of general public importance as permitted by *Deerfield Estates, Inc. v. E. Brunswick*, 286 A.2d 498, 60 N.J. 130 (N.J. 1972), see Petition for Certification filed with N.J. Supreme Court at Page 18. The New Jersey Supreme Court did not specifically address this issue; instead denying Petitioners' request for Certification without comment. See Pet. App. 63a.

As a result of the lower courts' decisions, Carlstadt's citizens are treated differently. The lower courts' decisions remove Carlstadt citizens' right of representation and replaced it with an un-elected "Monitor."

The citizens of Carlstadt are entitled to have their vote count as much as the vote of citizens of the other municipalities in the Meadowlands District. Under the lower courts' rulings, their vote is worth less; lacking the ability to elect a representative with authority to work with the NJMC.

It is long established that voters in similar situations should be treated similarly. See *U.S. v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1875) ("equality of the rights of citizens is a principle of republicanism; every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power.")

In *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000), the Court most recently recognized that, within a particular political subdivision, the value of a vote is entitled to constitutional protection:

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. *See, e.g., Harper v. Virginia Bd. of Elections*,

> 383 U.S. 663, 665, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) ("[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment"). It must be remembered that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). *Id.* at 104-105.

The lower courts' rulings denigrate the vote of Carlstadt citizens. Despite the legislative determination to the contrary, the votes of Carlstadt citizens do not have the weight of those of the other 13 municipalities in the Meadowlands District. The citizens of Carlstadt didn't elect the Mount Laurel Compliance Monitor. In every other municipality, a vote elects a representative to the HMMC. Not Carlstadt. This is unfair and violates the equal protection rights of Carlstadt's voters.

## 2. THE LOWER COURTS' RULINGS CREATE AN UNCONSTITUTIONAL PRIOR RESTRAINT ON THE POLITICAL SPEECH OF CARLSTADT OFFICIALS.

The breadth of the unconstitutional remedy imposed by the lower courts is underscored by the simple fact that Carlstadt has no legal authority to determine if or where affordable housing is to be placed in the Meadowlands District. That power is in the NJMC.

Despite that legal reality, the trial court imposed, and the Appellate Division affirmed, a prior restraint on political speech by Carlstadt officials.[3] Those officials are essentially muzzled from presenting the position of Carlstadt to the NJMC and the HMMC. Instead, the lower courts turned the process over to the courts' agent, the "Mount Laurel Compliance Monitor."

The speech of the Carlstadt officials, whether dealing in the HMMC, or with NJMC officials, relating to matters of land use policy is clearly "political speech." Political speech "occupies a preferred position in our system of constitutionally protected interests. *Murdock v. Pennsylvania*, 319 U.S. 105, 115, 63 S.Ct. 870, 876, 87 L.Ed. 1292 (1943). Content based political speech in a public forum is subject to "exacting scrutiny." To survive challenge, the restriction must be ". . . necessary to serve a compelling state interest . . ." and must be ". . . narrowly drawn to achieve that end." *Burson v.*

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[3] This issue was presented to the Trial Court, in open Court, on June 2, 2006. The Trial Court determined that the argument did not apply and entered the judgment under review. See Transcript of Proceedings, June 6, 2006 at pages 11-17. The matter was then presented to the Superior Court, Appellate Division through Petitioners' Brief filed with that Court. See Petitioners' Brief to the Superior Court, Appellate Division at Page 52-54. The Appellate Division rejected the argument contending that a Carlstadt official may, in a personal (not official) capacity, freely speak before the NJMC. See Pet. App. 19a. The issue was then raised before the New Jersey Supreme Court through Petitioners' Petition for Certification and Brief in support of its Notice of Appeal; see Petition for Certification at Pages 17-19. The New Jersey Supreme Court did not specifically address this issue; instead denying Petitioners' request for Certification without comment. See Pet. App. 63a.

*Freeman*, 504 U.S. 191, 195, 112 S.Ct. 1846, 1849, 119 L.Ed.2d 5, 12 (1992).

The lower courts' decisions rely on an implicit assumption that Carlstadt officials may advocate a position to the NJMC or in the HMMC, i.e., engage in speech, which is contrary to that of the Mount Laurel Compliance Monitor. The lower courts' rulings simply, and unconstitutionally, enact a prior restraint on political speech, essentially censoring the speech of Carlstadt officials.

Even if acceptable in theory, the implicit content-based censorship of Carlstadt officials' speech imposed by the lower court rulings is overbroad. The lower courts should have imposed a less restrictive means to assure that the affordable housing needs are addressed. *Id.* at 195, 112 S.Ct. at 1849, 119 L.Ed.2d at 12.

For example, rather than censor the speech of Carlstadt officials, as an lesser intrusive alternative the court could have mandated that the Mount Laurel Compliance Monitor's view on those issues be independently presented to the NJMC. The NJMC could then take all viewpoints into account when making its decision. Such decision would then be subject to judicial review like any other administrative agency decision.

That ensures that the Monitor's point of view is presented to the actual decision maker, but doesn't offend the value of the Carlstadt citizens' electoral decisions.

Since at least one less restrictive alternative was available, the lower courts violated the First and Fourteenth Amendment rights of Carlstadt officials, and inferentially its citizens, by imposing a prior restraint on political speech.

### 3. THE JUDGEMENT OF THE TRIAL COURT INVALIDATING CARLSTADT'S ZONING AND PLANNING ORDINANCES VIOLATED CARLSTADT'S RIGHT TO FUNDAMENTAL FAIRNESS IN THE NATURE OF DUE PROCESS AS PROTECTED BY THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The trial court imposed, and the Appellate Division affirmed, a declaration that the zoning and planning ordinances of Carlstadt were invalid. This was done as a remedy for Carlstadt's alleged failure to submit an appropriate HE/FSP.

Recognizing that the trial court has discretion when imposing a remedy for a perceived violation, that remedy must be within the appropriate discretion of the court and must be done with fundamental fairness, i.e., due process – notice of the sanction and an opportunity to be heard on that sanction. In the circumstances of this case, the lower courts failed on both counts.[4]

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[4] This issue is contained in the Final Judgment of the Trial Court as a result, and was not addressed in the trial court. The issue was presented to the Superior Court, Appellate Division through Petitioners' Brief filed with that Court. See Petitioners' Brief to the Superior Court, Appellate Division at Page 44-48. The Appellate Division's Opinion rejected this argument. (Cont'd)

The declaration of invalidity of Carlstadt's zoning and planning ordinances was entered without prior notice of the intent of the court to do so. The procedural posture of the case underscores that point.

Carlstadt filed its HE/FSP in a timely manner, and utilized traditional zoning techniques endorsed by the State of New Jersey to achieve the required result. Carlstadt then petitioned the trial court for approval of its plan.

Instead of approval, the trial court rejected the plan and, sua sponte, voided the zoning and planning ordinances of Carlstadt. There was no reason for Carlstadt to expect the draconian result that occurred. The court entered no "order to show cause" presaging that result. No request was made to brief that issue.

While case law indicates that a municipal corporation is not protected by the due process clause, see, for example, *State of S.C. v. Katzenbach*, 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966) that doesn't remove the requirement of fundamental fairness, consistent with the due process clause. That fairness requires notice and an opportunity to be heard before the decision is made. See *Mullane v. Central Hanover Bank & Trust*

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(Cont'd)
See Pet. App. 19a. The issue was then raised before the New Jersey Supreme Court through Petitioners' Petition for Certification and Brief in support of its Notice of Appeal; see Petition for Certification at Pages 12-15. The New Jersey Supreme Court did not specifically address this issue; instead denying Petitioners' request for Certification without comment. See Pet. App. 63a.

*Co.*, 339 U .S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950).

Here, had the lower court given prior notice of its intent to invalidate the zoning and planning ordinances of Carlstadt, evidence could have been submitted to demonstrate that Carlstadt's plan did indeed meet with the court's requirements. Moreover, Carlstadt would have demonstrated that its HE/FSP was consistent with those of countless other municipalities. This was not allowed to occur.

New Jersey administrative regulations, specifically N.J.A.C. 5:93-4.2(h), permits a municipality to satisfy its affordable housing obligation through the use of accessory apartments, overlay zoning requiring inclusionary development or the imposition of a development fee. Carlstadt followed that regulation and adopted both an overlay ordinance and a development fee ordinance and timely filed them with the trial court.

The lower courts applied a standard that did not comport with that regulation, determined that Carlstadt's HE/FSP did not take adequate action to address its unmet need, suspended its zoning and planning ordinance and turned over control of that aspect of the municipality to a court-appointed "Mount Laurel Compliance Monitor." All without prior notice.

Even if there was some technical deficiency in Carlstadt's plan, the trial court should not have immediately imposed the draconian remedies selected. New Jersey has consistently allowed a municipality which proceeded in good faith to amend deficient plans

to achieve compliance without dismissal of the municipality's compliance plan. See, for example, *In Re Petition of Howell Twp.*, 852 A.2d 258, 371 N.J. Super. 167 (N.J. App. Div. 2004). Carlstadt was not given that opportunity.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — OPINION OF THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DECIDED AUGUST 29, 2008

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-5512-05T1

TOMU DEVELOPMENT COMPANY, INC.,

Plaintiff-Respondent,

v.

BOROUGH OF CARLSTADT, and PLANNING BOARD OF CARLSTADT,

Defendants-Appellants,

and

NEW JERSEY MEADOWLANDS COMMISSION,

Defendant-Respondent.

*Appendix A*

DOCKET NO. A-5621-05T1

TOMU DEVELOPMENT COMPANY, INC.,

Plaintiff-Respondent,

v.

BOROUGH OF EAST RUTHERFORD, and PLANNING BOARD OF EAST RUTHERFORD,

Defendants-Appellants,

and

NEW JERSEY MEADOWLANDS COMMISSION,

Defendant-Respondent.

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DOCKET NO. A-5741-05T1

TOMU DEVELOPMENT COMPANY, INC.,

Plaintiff-Respondent,

v.

BOROUGH OF CARLSTADT, PLANNING BOARD OF CARLSTADT, BOROUGH OF EAST RUTHERFORD, PLANNING BOARD OF EAST RUTHERFORD,

Defendants-Respondents,

*Appendix A*

and

NEW JERSEY MEADOWLANDS COMMISSION,

Defendant-Appellant.

Submitted: April 9, 2008 – Decided: August 29, 2008

Before Judges Axelrad, Payne, and Messano.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket Nos. L-5894-03 and L-5895-03.

PER CURIAM

These three back-to-back appeals arise from two consolidated "builder's remedy" suits brought by plaintiff Tomu Development Company, Inc. (Tomu) alleging that two southern Bergen County municipalities, the Borough of Carlstadt (Carlstadt) and the Borough of East Rutherford (East Rutherford), and their respective planning boards,[1] engaged in patterns of exclusionary zoning that failed to address their *Mount Laurel*[2] affordable housing obligations. Because

1. In this opinion, the planning boards are encompassed in the reference to the municipalities.

2. *Southern Burlington County NAACP v. Mount Laurel Township*, 67 *N.J.* 151 (*Mount Laurel I*), *cert. denied* and *appeal dismissed*, 423 *U.S.* 808, 96 *S. Ct.* 18, 46 *L. Ed.* 2d 28 (1975); *Southern Burlington County NAACP v. Mount Laurel Township (Mt. Laurel II)*, 92 *N.J.* 158 (1983).

the land upon which Tomu proposed to build a development, including affordable housing, lay wholly within the statutorily created Meadowlands District, the New Jersey Meadowlands Commission (Meadowlands Commission) was joined as a party. *See N.J.S.A.* 13:17-11. The municipalities and Meadowlands Commission appeal from the orders declaring Tomu was entitled to a builder's remedy, allowing it to develop the site with an affordable housing component. The court's orders were based on its findings that the municipalities "failed to comply with their express obligations to provide realistic opportunities for affordable housing within their borders," the Meadowlands Commission "implicitly fostered the long-standing municipal failures through its benign neglect of the housing needs of the poor[,]" and that none of the defendants "demonstrated that the site is environmentally constrained, that construction of a high-density mixed-use project would represent bad planning," or that Tomu prosecuted the "action in bad faith." The municipalities also appeal from the order appointing a private person as a "Mount Laurel Implementation Monitor" to make all land use decisions for the two municipalities, including appearing before the Meadowlands Commission on their behalf. We affirm substantially for the cogent and comprehensive reasons articulated by Judge Jonathan Harris in his December 3, 2004 oral decision, November 10, 2005 written opinion, and May 19, 2006 oral decision and written opinion.

The subject property is an irregularly shaped plot of approximately 26.9 acres, with 4.9 acres in Carlstadt

(block 136, lots 14 and 15) and 22 acres in East Rutherford (block 107.03, lots 2, 5, and 7[3]). In Carlstadt only about 3.584 acres are developable uplands and in East Rutherford, 5.286 acres are developable uplands. The site is located at the terminus of Paterson Plank Road, on the banks of the Hackensack River and is separated from the Xanadu Development by the New Jersey Turnpike.

Tomu purchased the property from Riverview Associates in 1995. In 1989, contingent approvals were granted to permit construction of 350 residential units, of which 70 were required to be devoted to affordable housing, a 100-suite hotel, a 1,200-seat banquet facility, two restaurants, a fitness center, a multi-level parking facility, and a 240-slip marina. The conditionally approved plan included residential uses only in East Rutherford, with no housing in Carlstadt. The approvals lapsed in 1999, and Tomu appealed administratively.[4]

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3. Formerly designated as block 107A, lots 59A, B, C, D and L and 60B, and block 108A, lots 27C, 32C and 33C.

4. *See Riverview Associates v. New Jersey Meadowlands Commission*, OAL HMD 1118-00, initial decision (May 1, 2006), http://lawlibrary.rutgers.edu/oal/search.html> (holding that Meadowlands Commission's sudden denial of the extension in December 1999 was fundamentally unfair and the extension should be granted); *Riverview Associates v. New Jersey Meadowlands Commission*, OAL HMD 1118-00, final decision (July 25, 2007), http://lawlibrary.rutgers.edu/oal/search.html> (rejecting the ALJ's decision and affirming the Commission's denial); *Riverview Associates v. New Jersey Meadowlands Commission*, A-151-07T3 (appeal pending).

*Appendix A*

The land upon which Tomu proposed to build the development, straddling the boundary between Carlstadt and East Rutherford, was located within the Commercial District and Waterfront Recreational zone of the Meadowlands District. A certain measure of residential use was permitted on all of Tomu's uplands until the 2004 amendment to the Meadowlands District's Master Plan, after commencement of the present action. The Amendment changed the zoning of the site from Waterfront Development to Waterfront Recreation, which did not allow for housing.

In August 2003, Tomu filed exclusionary zoning complaints against the municipalities and thereafter the Meadowlands Commission, seeking a builder's remedy for permission to construct 988 residential units, divided equally between the two municipalities. The development proposal was thereafter redefined to consist of 420 housing units (360 market rate units and 60 affordable rental units) in East Rutherford, and an additional 420 housing units (340 market rate units and 80 affordable rental units) in Carlstadt, located in two mid-rise buildings, plus approximately 38,000 square feet of "ancillary development" of limited commercial, recreation, and environmental facilities.

On October 14, 2004, the Meadowlands Commission filed a motion for summary judgment seeking to dismiss Tomu's builder's remedy. It contended that Tomu had ample opportunity to construct the seventy affordable housing units on the site but failed to do so and that the newly adopted Master Plan and regulations

appropriately concluded the site was not deemed suitable for residential uses. The Meadowlands Commission also argued it should be dismissed from the action, primarily based on the claim that Tomu failed to exhaust administrative remedies against it. The municipalities filed cross-motions for partial summary judgment seeking to determine their *Mount Laurel* construction obligations as zero and to set their rehabilitation obligations, and to dismiss Tomu's builders remedy claim. Tomu also filed a motion for partial summary judgment, seeking a declaration that the municipalities' land use ordinances failed to comply with their *Mount Laurel* obligations to provide a reasonable opportunity for low and moderate income housing within their borders. Tomu additionally sought the appointment of a Special Master to assist the court and parties in fashioning constitutional compliance.

Following argument on December 3, 2004, and memorialized in orders on that date, the court granted Tomu's motion, declaring Carlstadt's and East Rutherford's land use ordinances were unconstitutional for failing to provide a realistic opportunity for the provision of their fair shares of low and moderate income housing. It further ordered that an attorney, Robert T. Regan, be appointed as the Special Master to assist the municipalities in complying with their *Mount Laurel* obligations. The court also denied the Meadowlands Commission's and municipalities' cross-motions. The municipalities filed appeals from these orders, which pursuant to Tomu's motion, we dismissed as interlocutory on March 16, 2006 (A-2373-05T5).

*Appendix A*

On February 1, 2005, Tomu filed a motion with supporting certifications seeking entry of a "scarce resources" order, asserting the land and infrastructure needed for affordable housing was scarce in the municipalities. Carlstadt filed several certifications in opposition to the motion. Following oral argument, the court requested a Special Master's report on the issue, which was completed on April 13, 2005. Carlstadt and the Meadowlands Commission each moved for an order rejecting some of the Master's recommendations. On May 13, 2005 the court entered an order declaring that land, public potable water supply, and sewerage capacity constituted scarce resources in Carlstadt and East Rutherford, including the parts of those municipalities that lay in the Meadowlands District under the jurisdiction of the Meadowlands Commission. The court restrained the municipalities from approving any new use of or access to those scarce resources without court approval, unless the uses fell within certain exceptions.

On June 13, 2005, the Special Master issued his report and recommendations to the court regarding the builder's remedy issue. The Meadowlands Commission moved for reconsideration of the court's denial of summary judgment, or, alternatively, for holding the litigation in inactive status until completion of pending administrative actions, which the court denied.

Judge Harris conducted a nine-day bench trial on the consolidated complaints from August 8 through November 3, 2005. In addition, he viewed the property in the presence of the attorneys under the procedures

of *Morris County Land Improvement Co. v. Township of Parsippany - Troy Hills*, 40 *N.J.* 539, 548-49 (1963). On November 10, 2005, the court issued a thirty-page opinion, concluding that Tomu had proved its entitlement to a builder's remedy and that its lands in East Rutherford and Carlstadt may be developed with the proposed mixed-use project because the municipalities failed to meet their obligations to provide realistic opportunities for affordable housing within their borders and the Meadowlands Commission "implicitly fostered" those municipal failures through its "benign neglect of the housing needs of the poor." The court further held the land use regulations of the municipalities remained invalid and unconstitutional insofar as they continued past exclusionary practices, and directed the municipalities to immediately prepare comprehensive compliance plans and appropriate zoning and planning legislation to meet their affordable housing obligations. An order was entered on November 28, 2005.

On February 28, 2006 and April 10, 2006, Carlstadt and East Rutherford, respectively, filed their affordable housing compliance plan documents and sought approval of the plans and judgments of repose that would protect them from builder's remedy litigation. The Special Master thereafter filed a report analyzing the Carlstadt and East Rutherford compliance plans. On April 26, 2006, the court heard argument on the motions.

The court rendered its decision on the record on May 19, 2006, followed by a written opinion later that

day, concluding the municipalities continued to be recalcitrant in implementing their *Mount Laurel* obligations and consequently creating, as an independent judicial officer, a "Mount Laurel Implementation Monitor" to oversee all land use authority in the two municipalities. The monitor's duties included preparing an affordable housing plan for each municipality and acting in place of the municipality in connection with development applications in the jurisdiction of the Meadowlands Commission. The court designated Regan, the Special Master, as the Implementation Monitor. The decision was memorialized in a final judgment of June 1, 2006. The trial court denied a stay. In late June 2006, Carlstadt, East Rutherford and the Meadowlands Commission filed appeals. On September 25, 2006, we granted Carlstadt's motion for a stay pending appeal (A-5512-05T1), which the parties agreed would also apply to East Rutherford.

On appeal, the three appellants argue the court erred in awarding Tomu a builder's remedy because: (a) the Meadowlands Commission did not zone the site for residential use; (b) the property was not suitable for affordable housing; and (c) Tomu improperly used the builder's remedy as a threat and failed to conduct good faith and pre-litigation negotiations. The municipalities additionally argue the court erred in: (1) ruling the municipalities failed to meet their *Mount Laurel* affordable housing obligations and develop appropriate affordable housing compliance plans; (2) imposing the punitive ruling of appointing a private person as an "Mount Laurel Implementation Monitor" which

removed authority from the municipalities' planning and zoning authority and did not benefit the municipalities; and (3) imposing an unconstitutional prior restraint on public officials' protected speech, and interfering with their duties owed to the public and with their constitutional rights to petition other branches of government for redress on public policy matters by appointing a "Mount Laurel Implementation Monitor." We are not persuaded by appellants' arguments and affirm.

In January 1969 the Legislature enacted the Hackensack Meadowlands Reclamation and Development Act, *N.J.S.A.* 13:17-60 to -76. *Meadowlands Reg'l Dev. Agency v. State*, 112 *N.J. Super.* 89, 124 (Ch. Div. 1970), *aff'd*, 63 *N.J.* 35, *appeal dismissed*, 414 *U.S.* 991, 94 *S. Ct.* 343, 38 *L. Ed.* 2d 230 (1973). The Act created the Hackensack Meadowlands Commission, now called the Meadowlands Commission, to oversee the orderly development of the Hackensack Meadowlands and to "provide a means to reclaim, plan, develop and redevelop 21,000 acres of public and private land in the Meadowlands District[], consisting of saltwater swamps, meadows and marshes, and related uplands." *Town of Secaucus v. Hackensack Meadowlands Dev. Comm'n*, 267 *N.J. Super.* 361, 367 (App. Div. 1993), *certif. denied*, 139 *N.J.* 187 (1994). In establishing the Meadowlands District, the Legislature recognized that "this land acreage is a land resource of incalculable opportunity for new jobs, homes and recreational sites, which may be lost to the State through piecemeal reclamation and unplanned development" and that an "orderly,

comprehensive development of these areas, due to their strategic location in the heart of a vast metropolitan area with urgent needs for more space for industrial, commercial, residential, and public recreational and other uses, can no longer be deferred[.]" *N.J.S.A.* 13:17-1. The District's boundaries, set out at *N.J.S.A.* 13:17-4, encompass parts of fourteen municipalities, including Carlstadt and East Rutherford.

In *In Re Adoption of N.J.A.C. 19:3, 19:4, 19:5 & 19:6*, 393 *N.J. Super.* 173 (App. Div. 2007), *certif. denied*, 194 *N.J.* 267-68 (2008), we held that under the New Jersey Constitution, as interpreted by the *Mount Laurel* cases, the Meadowlands Commission has an affirmative zoning and planning role to play in providing for affordable housing located in the Meadowlands in consultation with the Council on Affordable Housing (COAH). This decision, which post-dated Judge Harris' rulings, undercuts appellants' argument that Tomu could not obtain a builder's remedy because its property was in the Meadowlands District as the trial court was without jurisdiction to make such award because the municipalities did not have zoning authority for that property and the trial court was without authority to require the Meadowlands Commission, a State agency, to change its zoning to allow affordable housing on the site.

The core inquiry in *Mount Laurel* cases is whether a municipality has met its constitutional obligation by "affirmatively affording a realistic opportunity for the construction of its fair share of the present and

prospective regional need for low and moderate income housing." *Mount Laurel II, supra*, 92 *N.J.* at 205. The Supreme Court firmly established that in most instances where a developer succeeds in *Mount Laurel* litigation and proposes a project that would provide a substantial amount of lower income housing, the court should grant a builder's remedy. *Id.* at 278-81. "A developer is entitled to a builder's remedy if: (1) it succeeds in *Mount Laurel* litigation; (2) it proposes a project with a substantial amount of affordable housing; and (3) the site is suitable, that is, the municipality fails to meet its burden of proving that the site is environmentally constrained or construction of the project would represent bad planning." *Mount Olive Complex v. Twp. of Mount Olive*, 340 *N.J. Super.* 511, 525 (App. Div. 2001), *remanded on other grounds*, 174 *N.J.* 359 (2002).

Judge Harris reviewed voluminous reports and certifications in connection with the motions and trial. He also viewed the site and during the nine-day trial heard extensive testimony from Tomu's planner, Joseph Burgess; the municipalities' planner, Jill Hartmann; and Special Master Regan, regarding the second and third round Fair Share Housing obligations of the municipalities,[5] and all aspects of site suitability and

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5. COAH revised its third round substantive rules in response to the decision in *In Re Adoption of N.J.A.C. 5:94 & 5:95, by New Jersey Council on Affordable Housing*, 390 *N.J. Super.* 1 (App. Div.), *certif. denied*, 192 *N.J.* 72 (2007). *N.J.A.C.* 5:96, 5:97 (effective June 2, 2008), appeals pending, *IMO The Revised Third Round Regulations Promulgated by the NJ*

(Cont'd)

feasibility of the municipalities' proposed plans. Judge Harris made express credibility determinations. For example, he discredited Hartmann's opinion that Carlstadt had a zero realistic development potential, and explained in detail the reasons why he disagreed with the Master's conclusion that East Rutherford made a good faith effort to submit a compliant housing element.[6] The court made extensive findings, holding that Tomu met all three prongs of a successful builder's remedy case, proving: (1) the municipalities' zoning regulations invalidly failed to address affordable housing needs; (2) Tomu offered to make "substantial contributions" to the municipalities' "non-existent stock of family-type low and moderate income housing units"; and (3) the site could be developed as Tomu proposed without upsetting legitimate planning or environmental concerns.

We are satisfied there was ample evidence in the record for the judge's factual and legal findings supporting his rejection of the municipalities' municipal

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(Cont'd)

*Council on Affordable Housing, N.J.A.C. 5:96 and 5:97*, A-5382-07T3, A-5404-07T3, A-5423-07T3, A-5424-07T3, A-5429-07T3, A-5436-07T3, A-5451-07T3, A-5455-07T3, A-5458-07T3, A-5460-07T3, A-5461-07T3, A-5590-07T3, A-5752-07T3, A-5756-07T3, A-5757-07T3, A-5758-07T3, A-5759-07T3, A-5760-07T3, A-5761-07T3, A-5763-07T3, A-5765-07T3, A-5767-07T3, A-5871-07T3, and A-5920-07T3.

6. Regan reported that Carlstadt did not make a good faith effort to comply, particularly noting its continued opposition to residential use in the Meadowlands District.

compliance plans and his award to Tomu of a builder's remedy. *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 *N.J.* 474 (1974). As Judge Harris recognized, the matter was hybrid in that the municipalities possessed a *Mount Laurel* obligation as to which a builder's remedy was appropriate. East Rutherford and Carlstadt showed no inclination to voluntarily meet their affordable housing obligations, the Tomu site appeared to be one of the few remaining developable housing sites in the two municipalities, and it was imperative for the Meadowlands Commission to take a proactive role in the *Mount Laurel* process. We discern no procedural impediment in the manner in which Judge Harris conducted the litigation, including involving the Meadowlands Commission in enforcing the remedy, particularly in view of the trial court's concern that the Meadowlands Commission had recently approved a 614-unit residential project on District lands in East Rutherford along Route 3, without any *Mount Laurel* component.

Nor do we find persuasive appellants' alternative argument that the builder's remedy should be denied because Tomu's representatives used the litigation as a threat in meeting with municipal officials and because Tomu failed to conduct good faith negotiations in advance of litigation. We perceive no reason to elaborate upon Judge Harris' November 10, 2005 comments on this issue. *R.* 2:11-3(e)(1)(A), (E).

We are also satisfied there is ample basis in the record and in the spirit and law of *Mount Laurel* to

support Judge Harris' novel step of appointing a neutral "Mount Laurel Implementation Monitor" to formulate the land use development decisions for the two municipalities, including preparing a fair share plan and appearing before the Meadowlands Commission on Tomu's zoning applications for this parcel. The trial court's reasoning for appointing a monitor explains its understanding of the Meadowlands Commission's role in this process:

> Among the remedies available to the judiciary if a municipality fails or refuses to comply with a court-ordered *Mount Laurel* rezoning effort is to enjoin all further development within the municipal borders. Another is to suspend all legislative barriers that prohibit multi-family uses while at the same time ensuring that any such development includes affordable housing. It is no answer that the court should give East Rutherford and Carlstadt one more chance to comply; that they misunderstood the court's direction; and now they will get it right. The reason for the absence of this last bite of the apple remedy is two-fold. First the Supreme Court in *Mount Laurel II* would not countenance such a transparent delay tactic. Second, any further lag would only increase the detriment to plaintiff and the third party beneficiaries of plaintiff's builder's remedy by delaying the entry of a final, appealable judgment, again putting off into the future the ultimate disposition of this litigation. I must

act *now* to end this litigation in a way that protects and preserves the interests of all concerned. One remedy that I have considered and rejected is the use of contempt proceedings against individual governmental actors or the municipal corporations themselves. Although monetary sanctions might well incite the defendant municipalities into action, and I truly understand the power of the wallet, I intend to avoid the replication of local government errors that were committed in the past. Another reason I have eschewed the traditional contempt mode of ensuring compliance is to avoid the martyrdom syndrome that some public officials exploit. Rather than involve those governmental actors who have failed the public in the past, I have elected to simply remove them from the process and substitute a court-appointed monitor to oversee land development activities in East Rutherford and Carlstadt for the foreseeable future.

. . . .

The missing link in all the municipalities' compliance efforts has been the land in the jurisdiction of the New Jersey Meadowlands Commission. Contrary to plaintiff's view that East Rutherford and Carlstadt are required to lobby *affirmatively* for housing within their borders but beyond their control, I think that

> the municipalities should not be required to advocate purposefully positions that their elected officials deem contrary to the local public interest. This is especially so if it turns out that the New Jersey Meadowlands Commission is itself someday authoritatively obligated to ensure compliance with the *Mount Laurel* doctrine. However, recalcitrant municipalities, such as the defendants here, should not be allowed to inflict damage to affordable housing opportunities by either their active discouragement of such housing opportunities or by silence . . . a Mount Laurel Implementation Monitor shall be appointed to speak on behalf of each municipality on matters affecting affordable housing in the New Jersey Meadowlands District in order to ensure that the inertia engendered by each municipality will no longer impede appropriate affordable housing opportunities on lands in these municipalities under the control of the New Jersey Meadowlands Commission.

The appointment of the Implementation Monitor, with defined powers, is an inspired and appropriate exercise of the court's judicial powers, consistent with the *Mount Laurel* decisions, to assume oversight responsibility for the constitutional right to have zoning throughout New Jersey appropriately accommodate affordable housing where, as here, the municipalities neglected such constitutional obligations. Judge Harris' ruling was creative and insightful. It was definitely not

punitive. Rather than hold the municipal officials in contempt, which would have been a knee-jerk reaction, the judge wisely looked for a remedy that would move the case forward. The ruling was intended to avoid collaboration between the municipalities and Meadowlands Commission that would continue the pattern of non-compliance. It was also intended to allow the Special Master to continue to implement the *Mount Laurel* doctrine continuously ignored by the municipalities by seeking rezoning of the Tomu site and promoting other changes necessary to permit realistic opportunities for affordable housing in the municipalities. Noting there were limits on available land in the municipalities and the municipalities' recalcitrance in fulfilling their obligations, as well as the prior lost opportunities for affordable housing on District lands which should not be repeated, Judge Harris appropriately concluded it was imperative for a neutral person to seek to advance *Mount Laurel* goals on behalf of the municipalities before the Meadowlands Commission.

We perceive of no constitutional infirmity in this appointment. The issue involves who may speak to the Meadowlands Commission regarding land use matters of State constitutional significance, not the denial of governmental officials' rights to hold a particular office or an unconstitutional prior restraint on their rights to speak to the Meadowlands Commission on behalf of the municipalities' residents. The court's order does not prevent individual residents of Carlstadt and East

Rutherford from appearing before the Meadowlands Commission to express their views during the public portions of the meetings.

Affirmed.

## APPENDIX B — FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY FILED JUNE 1, 2006

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5894-03

*Civil Action*

FINAL JUDGMENT

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

v.

BOROUGH OF CARLSTADT, PLANNING BOARD OF CARLSTADT and NEW JERSEY MEADOWLANDS COMMISSION,

Defendants.

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5895-03

*Civil Action*

FINAL JUDGMENT

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

*Appendix B*

v.

BOROUGH OF EAST RUTHERFORD, PLANNING BOARD OF EAST RUTHERFORD and NEW JERSEY MEADOWLANDS COMMISSION,

Defendants.

**THIS MATTER** coming on to be heard before the Honorable Jonathan N. Harris on April 26, 2006 in the presence of Thomas Jay Hall, Esq. and Robert Kasuba, Esq. of the firm of Sills, Cummis, Epstein & Gross, P.C., attorneys for plaintiff Tomu Development Co., Inc. ("plaintiff" or "Tomu"); Richard J. Allen, Jr., Esq. of the firm of Kipp & Allen, LLP, attorney for defendants Borough of Carlstadt and Planning Board of Carlstadt; Beverly M. Wurth, Esq. of the firm of Calo Agostino, P.C., attorney for defendants Borough of East Rutherford and Planning Board of East Rutherford; and Christine Piatek, Esq., Deputy Attorney General (Zulima V. Farber, Attorney General), attorney for defendant New Jersey Meadowlands Commission ("NJMC"), upon the application of defendants Borough of Carlstadt and Planning Board of the Borough of Carlstadt and Borough of East Rutherford and Planning Board of the Borough of East Rutherford (hereinafter collectively "municipal defendants") for entry of a Judgment of Repose pursuant to *Southern Burlington County NAACP v. Mount Laurel Township*, 92 N.J. 158 (1983) (hereinafter "*Mount Laurel* II"), and the Court having previously entered an Order granting plaintiff a builder's remedy and determining that the land use

regulations of the municipal defendants remain invalid and unconstitutional insofar as such provisions continue past exclusionary practices, which determination was memorialized in an Order dated November 28, 2005, which also obligated the municipal defendants to draft meaningful Housing Element and Fair Share Plans and other legislation consonant with rules of the Council On Affordable Housing (hereinafter "COAH"), and the Court having rendered a written Decision dated May 19, 2006, the provisions of which are incorporated herein by reference, and good cause appearing:

**IT IS** on this 1 day of June, 2006:

**ORDERED AND ADJUDGED** that effective on June 1, 2006 and continuing until further Order of this Court as follows:

1. There are hereby created, as independent judicial officers, a Mount Laurel Implementation Monitor for the Borough of East Rutherford and a Mount Laurel Implementation Monitor for the Borough of Carlstadt (collectively called "Monitor"). All reasonable fees, costs, and expenses of the Monitor shall be borne by the Boroughs of East Rutherford and Carlstadt in proportion to the work done on behalf of each municipality by the Monitor. The Monitor shall have no role in local government affairs except as provided in this judgment. Excluding matters within the sole jurisdiction of the New Jersey Meadowlands Commission, no zoning permit, building permit, or any other authorization to use or develop land or structures

within the Borough of East Rutherford or the Borough of Carlstadt shall be valid until and unless it is reviewed and approved by the Monitor who shall have the following additional powers:

A. The Monitor shall have unfettered access to all documents and information the Monitor determines are necessary to assist it in the execution of its duties. The Monitor shall have the authority to meet with, and require reports on any relevant subject from any officer, agent, or employee of the Boroughs of East Rutherford and Carlstadt. The Monitor shall receive advance notice of, and have the option to attend scheduled meetings of the governing bodies, planning boards, and boards of adjustment.

B. After giving due regard to the current (but now suspended) land use development legislation heretofore enacted by the municipalities, the Monitor shall forthwith adopt all necessary rules and regulations (including, if appropriate, interim or temporary rules and regulations) – in lieu of zoning, land use, and development ordinances – that will immediately provide reasonable opportunities for the creation of low and moderate income housing in accordance with the Fair Housing Act (hereinafter "FHA") and the rules and regulations of COAH. Each municipality shall immediately adopt by ordinance the Monitor's rules and regulations as the municipality's respective land use legislation. If a municipality fails or refuses to adopt the Monitor's rules and regulations as its respective land use legislation, said rules and regulations shall

nevertheless substitute for and act as the land use laws of the respective municipality, to be enforced as such by the Monitor and the municipality's agents, officers, and employees.

C. The monitor shall oversee and review all applications for development, requests for land use or building permits, requests for interpretations, and appeals that would otherwise be within the jurisdiction of the boards of adjustment, planning boards, or administrative officials jurisdiction under the Municipal Land Use Law. In order to validate any application for development, request for land use or building permit, request for interpretation, or appeal, the approval of the Monitor shall be required. The Monitor shall have the authority to disapprove, reverse, or reject any application for development, application for a land use or building permit, request for an interpretation, or appeal if it would frustrate, impede, or counteract the creation of low and moderate income housing in the municipality. Similarly, the Monitor shall have the authority to overrule and reverse the denial of an application for development, request for a land use or building permit, request for an interpretation, or appeal if, in the exercise of the Monitor's discretion and judgment, such application for development, request for a land use or building permit, request for an interpretation, or appeal would foster the creation of low and moderate income housing opportunities.

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D. The Monitor shall prepare a formal Housing Element and Fair Share Plan (hereinafter "Affordability Plan") for each municipality. The Affordability Plan shall comply with the FHA and all current rules and regulations of COAH, and shall include provisions to meet all obligations relating to indigenous need, new construction, unmet need, and COAH's third round rules. The Monitor shall be permitted to utilize and implement any technique authorized by the FHA or COAH including but not limited to regional contribution agreements, accessory apartments, and mobile homes to achieve compliance. Each municipality shall be required to adopt the Affordability Plan of the Monitor and shall take all appropriate actions, including appropriating funds and executing all necessary documents, to implement the provisions of the Affordability Plan.

E. The Monitor shall act in the place and stead of the municipality or its designated agent (as provided by statute, regulation, or common practice) in connection with development applications, zoning and planning activities, or requests for permits that are within the jurisdiction of the New Jersey Meadowlands Commission. In this capacity, the Monitor shall advocate, either district-wide or on an application-by-application basis, for the creation of affordable housing opportunities within each municipality even if the New Jersey Meadowlands Commission has sole jurisdiction over the matter. The Boroughs of East Rutherford and Carlstadt, together with their agents, officers, and employees, are enjoined and barred from taking any

action, whether orally or in writing, in connection with development applications, zoning and planning activities, or requests for permits that are within the jurisdiction of the New Jersey Meadowlands Commission unless such action is approved by the Monitor in writing in advance.

F. The Monitor shall apply to COAH, when the instant litigation is concluded, for substantive certification pursuant to then extant statutes, rules, and regulations.

G. The Monitor shall take such other actions, including but not necessarily limited to the hiring of experts, agents, and employees, that are reasonably necessary for conducting the activities of the Monitor. Additionally, the Monitor shall have authority to require the municipalities and their agents, officers, and employees to take any actions the Monitor believes are necessary for compliance with this judgment.

2. All zoning, land use, and development ordinances of the Borough of East Rutherford and the Borough of Carlstadt, including site plan and subdivision ordinances, are hereby suspended and rendered ineffectual relating to any and all future land use, construction, or development efforts in the municipalities. Such ordinances shall be treated as advisory only and shall serve as commentary to serve the Monitor. Until the Monitor adopts the rules and regulations as required by this judgment (whether interim, temporary, or permanent) 1) no development

applications shall be reviewed by the municipalities' boards of adjustment or planning boards and 2) no building or other land use permits shall be issued by any officer, agent, or employee of the defendant municipalities, except those necessary to avoid imminent peril to life or property. Said ordinances, however, shall continue in full force and effect for all uses and structures that currently exist (meaning that there is a valid certificate of occupancy or building permit in effect) in order to prevent the illegal use of land and structures. Uses and structures that have been approved by a local construction official, zoning officer, board of adjustment, or planning board but have not yet commenced operation or begun construction are prohibited from commencing operation or beginning construction until reviewed and approved by the Monitor for compliance with this judgment.

3. The terms and conditions of the Order Imposing Scarce Resource Restraints dated May 13, 2005 (annexed to this Final Judgment) are continued until further order of the court.

4. Robert T. Regan, Esq. is appointed the Monitor. If the Monitor resigns or is unable to serve, a successor shall be appointed by the court within thirty days. The Monitor shall serve until further order of the court or until final substantive certification is obtained from COAH, whichever is sooner.

5. All elected officials of the Boroughs of East Rutherford and Carlstadt shall be required to certify in

writing, and submit their certifications to the Monitor no later than December 31, 2006, that they have read the Preface (pp. xi to xiv), Prologue (pp. 3 to 11), and Chapter XI (pp. 175 to 185) of *Suburbs Under Seige* by Charles M. Haar (Princeton University Press 1996).

6. The municipalities are not entitled to a judgment of repose because they have not met their constitutional obligations and have not complied with the FHA, including the COAH third round obligations. In lieu of a judgment of repose, upon the conclusion of this case the municipalities shall apply for and obtain substantive certification through COAH's procedures.

7. A copy of this Final Judgment shall be served by the Special Master upon all counsel of record within 5 days of the date hereof.

s/ Jonathan N. Harris
JONATHAN N. HARRIS, J.S.C.

## APPENDIX C — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY DECIDED MAY 19, 2006

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5894-03

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

v.

BOROUGH OF CARLSTADT, PLANNING BOARD OF CARLSTADT and the NEW JERSEY MEADOWLANDS COMMISSION,

Defendants.

---

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5895-03

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

v.

BOROUGH OF EAST RUTHERFORD, PLANNING BOARD OF EAST RUTHERFORD, and the NEW JERSEY MEADOWLANDS COMMISSION,

Defendants.

*Appendix C*

JONATHAN N. HARRIS, J.S.C.

*PREFACE*

More than six months have elapsed since I unequivocally declared that Carlstadt and East Rutherford had neglected their constitutional obligations under the *Mount Laurel*[1] doctrine and their statutory duties under the Fair Housing Act. No responsible local official is unaware of the responsibilities that these principles have imposed. Yet, ignoring my order to comply fully by February 28, 2006 (110 days from the November 10, 2005 opinion), the defendant municipalities have again disappointed the citizens of the State of New Jersey. I start my analysis of the situation with the following thoughts in mind:

> If not you, who? If not now, when?
>
> (Paraphrased from the Talmud)

> Given the importance of the societal interest in the Mount Laurel obligation and the potential for inordinate delay in satisfying it, presumptive validity of an ordinance attaches but once in the face of a Mount Laurel challenge. Equal treatment requires at the very least that government be as fair to the poor as it is to the rich in the provision of

1. *So. Burlington Cty. N.A.A.C.P. v. Mt. Laurel Tp.*, 92 *N.J.* 158 (1983).

> housing opportunities. That is the basic justification for Mount Laurel. When that clear obligation is breached, and instructions given for its satisfaction, it is the municipality, and not the plaintiffs, that must prove every element of compliance. *It is not fair to require a poor man to prove you were wrong the second time you slam the door in his face.*
>
> *Mount Laurel, supra*, 92 *N.J.* at 190-191. (Emphasis added.)

*INTRODUCTION*

This is the compliance portion of a *Mount Laurel* II builder's remedy action that now requires the defendant municipalities to comply tangibly with their constitutional obligations regarding affordable housing. On November 10, 2005, in a written opinion, I declared that Carlstadt and East Rutherford had engaged in conduct unbecoming local government in New Jersey. In addition to awarding plaintiff a builder's remedy, I gave the municipal defendants one last chance each to legislate frameworks that would constitute compliance with their obligations to ensure reasonable opportunities for the actual construction of low and moderate income housing within their borders. Notwithstanding being painfully aware that such tasks would be complicated in light of the mutual exclusivity of zoning authority attributable to the New Jersey Meadowlands Commission's control of vast lands in East Rutherford and Carlstadt, they have incompletely

performed. Accordingly, I must reluctantly employ drastic steps to fulfill the judiciary's duty to vouchsafe fidelity to constitutional norms. *Mount Laurel* II commands such actions in the face of such longstanding and blatant disregard for the unhoused and underhoused poor.

## *II. FACTUAL BACKGROUND*

The factual background of this case is documented in the prior opinion dated November 10, 2005, and familiarity with that opinion is assumed. Following the builder's remedy phase of the case, I ordered the following:

> East Rutherford's and Carlstadt's land use regulations remain invalid and unconstitutional insofar as they continue past exclusionary practices. The East Rutherford and Carlstadt Planning Boards and the respective governing bodies shall immediately prepare comprehensive compliance plans (including appropriate strategies to address the indigenous and unmet needs) for each municipality, together with zoning and planning legislation to satisfy the fair share obligations of rounds one and two, and the unmet need, all in compliance with COAH regulations. They shall draft meaningful Housing Element and Fair Share Plans, together with fee ordinances (if appropriate) and spending plans that are consonant with COAH rules.

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> They shall exercise planning discretion in deciding whether to employ a program of rehabilitation grants, regional contribution agreements, accessory apartments, mobile homes, overlay zones, or any other incentive devices to meet the fair share and unmet need. This plan shall be completed, adopted, and presented to the court no later than February 28, 2006. In default thereof, *all* development regulations in East Rutherford and Carlstadt shall be permanently invalidated and a scarce resource order enjoining *all* land use development applications in East Rutherford and Carlstadt (whether before the Planning Board or Board of Adjustment or the NJMC) shall become automatically effective. On the other hand, if the municipalities, or either of them, comply, they will be entitled to a six-year judgment of repose commencing no earlier than February 28, 2006.

For its first and second round obligations as derived by the Council on Affordable Housing (COAH) under the Fair Housing Act, *N.J.S.A.* 52:27D-301 *et seq.* (FHA), East Rutherford was obligated to provide 70 units of new construction and 34 units of rehabilitated housing. Since the builder's remedy provided for 60 affordable units on the Tomu site, East Rutherford did not have far to stretch to find the additional ten units to fulfill its complement of new construction. Carlstadt, on the other hand, had a COAH-generated obligation of 186 units of

new construction and 12 units of rehabilitated housing. The builder's remedy provided 80 affordable units in Carlstadt, thereby producing an unmet need for new construction of 106 units.

In order to meet the mandate of this court's order to rezone, both municipalities engaged in legislative activities. East Rutherford proposes three zoning changes. The first, implementing a mandatory 20% set aside for affordable units, will apply in its Neighborhood Commercial District. The second, an overlay zone providing for the redevelopment of industrial properties, will affect an 18-acre site known as the Star-Glo site and a separately owned 7.44-acre site. Third, a "Mixed Residential Overlay Zone," will affect a 4.79-acre site known as the Sequa site. The evidence presented regarding these zoning changes vis-à-vis site suitability and feasibility of development within the next six years was scanty and unpersuasive. Additionally, East Rutherford intends to implement a development fee ordinance. Conspicuously missing from East Rutherford's plan is any treatment of its rehabilitation obligation. Furthermore, East Rutherford eschews its COAH round three obligations, claiming that they are irrelevant to this proceeding.

In addition to adopting its own development fee ordinance, Carlstadt created two overlay zones in what it calls "upland Carlstadt" to fulfill its unmet need of new construction. One overlay zone affects Carlstadt's entire residential district and the other affects a light industrial area. In addition, Carlstadt claims that it has

committed itself to redevelop municipally owned land (the former Washington School) to 100% affordable senior housing, but the details are conspicuously ambiguous. As with East Rutherford, Carlstadt has taken no meaningful steps to address its rehabilitation obligation and has ignored its round three obligations.

## *III. DETERMINATIONS OF LAW*

At this stage of proceedings, the municipalities bear a tremendous burden of persuasion. Not only have they lost the builder's remedy portion of the litigation, but also their land use regulations have been found constitutionally wanting. This latter deficiency is required to be fixed as part of a unitary piece of litigation. Although the Special Master finds some salvation in East Rutherford's compliance effort, I cannot agree with him. With regard to Carlstadt, its thinly veiled half-baked offering was rightly rejected by the Special Master, a conclusion that is well supported by the record.

When a municipality has been found to have failed in its constitutional mandate to provide realistic opportunities for low and moderate income housing within its borders, the court, as here, gives it one last chance. With that last-chance opportunity, the municipality must hew to applicable COAH regulations. At the very least, a municipality must conform its conduct to meet its new construction obligation, its rehabilitation obligation, and if a vacant land adjustment is granted (as here with Carlstadt), its unmet need. The easiest determination to make in this case relates to the utter

failure and continued deafening silence of both municipalities to provide resources for their indigenous rehabilitation obligations. This is peculiarly significant because providing housing opportunities for rehabilitation purposes affects homegrown local citizens, not newcomers. Such efforts, usually to be applicable on a micro-local scale, are noteworthy for improving neighborhoods and individual qualities of life. Rehabilitation efforts do not implicate the more-feared large scale intrusions of mixed use or multifamily developments containing both market rate and affordable housing units. Although each defendant professes false piety that it is willing to participate in a recognized rehabilitation program administered by a county agency, no affirmative steps toward that end appear to have been seriously contemplated, much less planned for. This, again, is especially egregious because the rehabilitation obligation relates to existing residences and will most likely affect existing residents. The failure to address proactively a rehabilitation program for each municipality's indigenous need leaves their current low and moderate income populace at grave risk to all of the ills associated with substandard housing.

Under past and present COAH rules, the municipalities were required, by the compliance due date of February 28, 2006, at least to designate an administrator to administer a rehabilitation program, submit a marketing plan, provide a framework of affordability controls for between six and ten years, fund up to $10,000 per unit of rehabilitation, submit a

rehabilitation manual, and agree to submit to COAH monitoring. *See N.J.A.C.* 5:93-5.2; *N.J.A.C.* 5:94-4.3. It is no answer to their default that the municipalities plan to do all of this in the future. Their obligation was to comply before this litigation even commenced, and in the face of that initial failure, to comply by the date ordered in my November 10, 2005 written opinion.

Much more provocative is the failure of East Rutherford and Carlstadt to comply adequately with their recalculated new construction obligations and unmet need. East Rutherford must identify the reasonable likelihood that at least ten affordable units can be distilled from its revamped zoning regulations. In order to do this, it must designate sites and prove that they meet the criteria of *N.J.A.C.* 5:93-5.3(b) (availability, suitability, developability, and approvability). Instead of that painstaking proof, East Rutherford merely casts a blanket of a 20% set-aside upon a land mass without demonstrating the likely yield of affordable units therefrom. Anecdotal information about the plans of developers and ongoing, incomplete applications is no substitute for the firm evidence required by COAH regulations. In addition, East Rutherford's planning efforts to encourage redevelopment for affordable residential use in an industrial district ignores whether any of the hoped-for sites are qualified to be counted under N.J.A.C. 5:93-5.3(b) as likely candidates for actual construction of affordable housing.

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Carlstadt's efforts toward compliance stand on a different footing than East Rutherford's because it received a vacant land adjustment, and the Tomu builder's remedy will fulfill its new construction obligation. However, under *N.J.A.C.* 5:93-4.1, the difference between the initial new construction obligation and the recomputed (after a vacant land adjustment) obligation must be the subject of planning initiatives to ensure that if developable land becomes available in the future, there will be a firm mechanism in place to capture affordable housing opportunities on that land. Thus, the municipality must plan for this unmet need by legislative devices such as a redevelopment ordinance, a development fee ordinance, or an apartments-in-a-developed-area ordinance. *N.J.A.C.* 5:93-4.1(b). None of these strategies was used. Instead, Carlstadt uses a simplistic overlay zone technique that does not reveal the likely yield of units as to any potential properties in the future. In addition, however, Carlstadt trumpets its plan to convert a former school into an affordable housing facility for seniors. None of the details of the proposal complies with *N.J.A.C.* 5:93-5.5, leaving the court and poor seniors in the dark as to the nature, scope, and timetable of the not-even embryonic development.

The missing link in all of the municipalities' compliance efforts has been the land in the jurisdiction of the New Jersey Meadowlands Commission. Contrary to plaintiff's view that East Rutherford and Carlstadt are required to lobby *affirmatively* for housing within their borders but beyond their control, I think that the

municipalities should not be required to advocate purposefully positions that their elected officials deem contrary to the local public interest. This is especially so if it turns out that the New Jersey Meadowlands Commission is itself someday authoritatively obligated to ensure compliance with the *Mount Laurel* doctrine. However, recalcitrant municipalities, such as the defendants here, should not be allowed to inflict damage to affordable housing opportunities by either their active discouragement of such housing opportunities or by silence. As I will outline later, as part of the remedies section of this opinion, a Mount Laurel Implementation Monitor shall be appointed to speak on behalf of each municipality on matters affecting affordable housing in the New Jersey Meadowlands District in order to ensure that the inertia engendered by each municipality will no longer impede appropriate affordable housing opportunities on lands in these municipalities under the control of the New Jersey Meadowlands Commission.

Among the remedies available to the judiciary if a municipality fails or refuses to comply with a court-ordered *Mount Laurel* rezoning effort is to enjoin all further development within the municipal borders. Another is to suspend all legislative barriers that prohibit multi-family uses while at the same time ensuring that any such development includes affordable housing. It is no answer that the court should give East Rutherford and Carlstadt one more chance to comply; that they misunderstood the court's direction; and now they will get it right. The reason for the absence of this last bite of the apple remedy is two-fold. First, the

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Supreme Court in *Mount Laurel* II would not countenance such a transparent delay tactic. Second, any further lag would only increase the detriment to plaintiff and the third party beneficiaries of plaintiff's builder's remedy by delaying the entry of a final, appealable judgment, again putting off into the future the ultimate disposition of this litigation. I must act *now* to end this litigation in a way that protects and preserves the interests of all concerned. One remedy that I have considered and rejected is the use of contempt proceedings against individual governmental actors or the municipal corporations themselves. Although monetary sanctions might well incite the defendant municipalities into action, and I truly understand the power of the wallet, I intend to avoid the replication of local government errors that were committed in the past. Another reason I have eschewed the traditional contempt mode of ensuring compliance is to avoid the martyrdom syndrome that some public officials exploit. Rather than involve those governmental actors who have failed the public in the past, I have elected to simply remove them from the process and substitute a court-appointed monitor to oversee land development activities in East Rutherford and Carlstadt for the foreseeable future.

Here is my plan, to be effective on June 1, 2006, and continuing until further order of the court:

1. There are hereby created, as independent judicial officers, a Mount Laurel Implementation Monitor for the Borough of East Rutherford and a Mount

*Appendix C*

Laurel Implementation Monitor for the Borough of Carlstadt (collectively called Monitor). All reasonable fees, costs, and expenses of the Monitor shall be borne by the Boroughs of East Rutherford and Carlstadt in proportion to the work done on behalf of each municipality by the Monitor. The Monitor shall have no role in local government affairs except as provided in this judgment. Excluding matters within the sole jurisdiction of the New Jersey Meadowlands Commission, no zoning permit, building permit, or any other authorization to use or develop land or structures within the Borough of East Rutherford or the Borough of Carlstadt shall be valid until and unless it is reviewed and approved by the Monitor who shall have the following additional powers:

a. The Monitor shall have unfettered access to all documents and information the Monitor determines are necessary to assist it in the execution of its duties. The Monitor shall have the authority to meet with, and require reports on any relevant subject from any officer, agent, or employee of the Boroughs of East Rutherford and Carlstadt. The Monitor shall receive advance notice of, and have the option to attend, scheduled meetings of the governing bodies, planning boards, and boards of adjustment.

b. After giving due regard to the current (but now suspended) land use development legislation heretofore enacted by the municipalities, the Monitor shall forthwith adopt all necessary rules and regulations (including, if appropriate, interim or temporary rules and regulations) — in lieu of zoning, land use, and development ordinances — that will immediately provide reasonable opportunities for the creation of low and moderate income housing in accordance with the FHA and the rules and regulations of COAH. Each municipality shall immediately adopt by ordinance the Monitor's rules and regulations as the municipality's respective land use legislation. If a municipality fails or refuses to adopt the Monitor's rules and regulations as its respective land use legislation, said rules and regulations shall nevertheless substitute for and act as the land use laws of the respective municipality, to be enforced as such by the Monitor and the municipality's agents, officers, and employees.

c. The Monitor shall oversee and review all applications for development, requests for land use or building permits, requests for interpretations, and appeals that would otherwise be within the jurisdiction of the boards of adjustment, planning boards, or

administrative officials' jurisdiction under the Municipal Land Use Law. In order to validate any application for development, request for land use or building permit, request for interpretation, or appeal, the approval of the Monitor shall be required. The Monitor shall have the authority to disapprove, reverse, or reject any application for development, application for a land use or building permit, request for an interpretation, or appeal if it would frustrate, impede, or counteract the creation of low and moderate income housing in the municipality. Similarly, the Monitor shall have the authority to overrule and reverse the denial of an application for development, request for a land use or building permit, request for an interpretation, or appeal if, in the exercise of the Monitor's discretion and judgment, such application for development, request for a land use or building permit, request for an interpretation, or appeal would foster the creation of low and moderate income housing opportunities.

d. The Monitor shall prepare a formal Housing Element and Fair Share Plan (Affordability Plan) for each municipality. The Affordability Plan shall comply with the FHA and all current rules and regulations of COAH, and shall include

provisions to meet all obligations relating to indigenous need, new construction, unmet need, and COAH's third round rules. The Monitor shall be permitted to utilize and implement any technique authorized by the FHA or COAH including but not limited to regional contribution agreements, accessory apartments, and mobile homes to achieve compliance. Each municipality shall be required to adopt the Affordability Plan of the Monitor and shall take all appropriate actions, including appropriating funds and executing all necessary documents, to implement the provisions of the Affordability Plan.

e. The Monitor shall act in the place and stead of the municipality or its designated agent (as provided by statute, regulation, or common practice) in connection with development applications, zoning and planning activities, or requests for permits that are within the jurisdiction of the New Jersey Meadowlands Commission. In this capacity, the Monitor shall advocate, either district-wide or on an application-by-application basis, for the creation of affordable housing opportunities within each municipality even if the New Jersey Meadowlands Commission has sole jurisdiction over the matter. The Boroughs of East Rutherford and Carlstadt, together

with their agents, officers, and employees, are enjoined and barred from taking any action, whether orally or in writing, in connection with development applications, zoning and planning activities, or requests for permits that are within the jurisdiction of the New Jersey Meadowlands Commission unless such action is approved by the Monitor in writing in advance.

f. The Monitor shall apply to COAH, when the instant litigation is concluded, for substantive certification pursuant to then extant statutes, rules, and regulations.

g. The Monitor shall take such other actions, including but not necessarily limited to the hiring of experts, agents, and employees, that are reasonably necessary for conducting the activities of the Monitor. Additionally, the Monitor shall have authority to require the municipalities and their agents, officers, and employees to take any actions the Monitor believes are necessary for compliance with this judgment.

2. All zoning, land use, and development ordinances of the Borough of East Rutherford and the Borough of Carlstadt, including site plan and subdivision ordinances, are hereby

suspended and rendered ineffectual relating to any and all future land use, construction, or development efforts in the municipalities. Such ordinances shall be treated as advisory only and shall serve as commentary to serve the Monitor. Until the Monitor adopts the rules and regulations as required by this judgment (whether interim, temporary, or permanent) 1) no development applications shall be reviewed by the municipalities' boards of adjustment or planning boards and 2) no building or other land use permits shall be issued by any officer, agent, or employee of the defendant municipalities, except those necessary to avoid imminent peril to life or property. Said ordinances, however, shall continue in full force and effect for all uses and structures that currently exist (meaning that there is a valid certificate of occupancy or building permit in effect) in order to prevent the illegal use of land and structures. Uses and structures that have been approved by a local construction official, zoning officer, board of adjustment, or planning board but have not yet commenced operation or begun construction are prohibited from commencing operation or beginning construction until reviewed and approved by the Monitor for compliance with this judgment.

3. The terms and conditions of the Order Imposing Scarce Resource Restraints dated May 13, 2005 (annexed to this opinion) are continued until further order of the court.

4. Robert T. Regan, Esq. is appointed the Monitor. If the Monitor resigns or is unable to serve, a successor shall be appointed by the court within thirty days. The Monitor shall serve until further order of the court or until final substantive certification is obtained from COAH, whichever is sooner.

5. All elected officials of the Boroughs of East Rutherford and Carlstadt shall be required to certify in writing, and submit their certifications to the Monitor no later than December 31, 2006, that they have read the Preface (pp. xi to xiv), Prologue (pp. 3 to 11), and Chapter XI (pp. 175 to 185) of *Suburbs Under Siege* by Charles M. Haar (Princeton University Press 1996).[2]

6. The municipalities are not entitled to a judgment of repose because they have not met their constitutional obligations and have not complied with the FHA, including the COAH third round obligations. In lieu of a judicial judgment of repose, I contemplate that upon conclusion of this case, the municipalities will obtain substantive certification through COAH's procedures.

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2. Available at the Ridgewood Public Library, Ridgewood, New Jersey under call number 344.73 HAA. *See http://www2.bccls.org/* (last visited on May 19, 2006) and *http://www.ridgewoodlibrary.org/* (last visited on May 19, 2006).

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*IV. CONCLUSION*

I request that Mr. Regan prepare the appropriate final judgment to memorialize this decision and submit it to opposing counsel and to the court as soon as possible pursuant to R. 4:42-1(c).

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FILED
MAY 13, 2005
JONATHAN N. HARRIS J.S.C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY
DOCKET NO: BER-L-5894-03

Civil Action

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

v.

BOROUGH OF CARLSTADT, PLANNING BOARD OF CARLSTADT and NEW JERSEY MEADOWLANDS COMMISSION,

Defendants.

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY
DOCKET NO. BER-L-5895-03

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v.

BOROUGH OF EAST RUTHERFORD, PLANNING BOARD OF EAST RUTHERFORD and NEW JERSEY MEADOWLANDS COMMISSION,

Defendants.

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## ORDER IMPOSING SCARE RESOURCE RESTRAINTS

This matter has been brought to the Court upon the application of Plaintiff, Tomu Development Co., Inc. ("Tomu") for a scarce resource order in the above-captioned litigation, and the Court having heard oral argument on February 18, 2005 and requested the court-appointed Master to issue a report on this motion. The court-appointed Master has reviewed the parties' submissions and approved of the issuance of a scarce resource order as set forth in his report dated April 13, 2005, and the Court having considered the submissions of the parties regarding the master's report finds that good cause exists for this Order to be entered,

IT IS on this 13 day of May, 2005, ORDERED as follows:

1. The Borough of Carlstadt's motion objecting to the report of the Special Master dated April 13, 2005 is DENIED.

2. The New Jersey Meadowlands Commission's objections to the report of the Special Master dated April 13, 2005 is DENIED in part and GRANTED in part, as set forth below.

3. The report dated April 13, 2005 of Mr. Regan, the court-appointed Master, is APPROVED except as MODIFIED below.

*Appendix C*

4. Land, public potable water supply and sewerage capacity are hereby declared to be a scarce resource within the Borough of East Rutherford ("East Rutherford") and the Borough of Carlstadt ("Carlstadt"), including the portions of both municipalities that are under the jurisdiction of the New Jersey Meadowlands Commission ("NJMC").

5. a. Subject to Paragraph 9 of this Order, public sewerage is hereby declared a scarce resource in Carlstadt and East Rutherford (collectively, "Municipal Defendants"). Any and all public sewer capacity in Carlstadt and East Rutherford, other than gallonage currently allocated to serve existing uses, is hereby placed under the control of the Court. No new sanitary sewer connections can be granted for any development and/or redevelopment project in Carlstadt and/or East Rutherford, including those portions of both municipalities that are located within the jurisdiction of New Jersey Meadowlands Commission ("NJMC"), without the prior approval of the Court.

b. Notwithstanding the provisions of Paragraph 5.a above, any new sanitary sewer connection, which is estimated to generate less than 1,500 gpd of wastewater, shall be automatically exempted from the restraints on the further depletion of the sewerage system as set forth in this Order and shall not be required to apply for relief from this Order under the provisions set forth in Paragraph 8.

*Appendix C*

6. a. Subject to Paragraph 9 of this Order, potable water is hereby declared a scarce resource in East Rutherford and Carlstadt. Any and all potable public water supply in East Rutherford and Carlstadt, other than that supply serving existing uses, is hereby placed under the control of the Court. No new connections to public water supply can be granted for any development and/or redevelopment project in East Rutherford and/or Carlstadt, including those portions of both municipalities that are located within the jurisdiction of the NJMC, without prior approval of the Court.

b. Notwithstanding the provisions of Paragraph 6.a above, any new connection to the public potable water supply, which is estimated to use less than 1,500 gpd of potable water, shall be automatically exempted from the restraints on further depletion of the public water supply as set forth in this Order and shall not be required to apply for relief from this Order under the provisions set forth in Paragraph 8.

7. a. Subject to Paragraph 9 of this Order, land whether currently vacant or redevelopable, is hereby declared a scarce resource in Carlstadt and East Rutherford, including those portions of both municipalities that are located within the jurisdiction of the NJMC. No application for development and/or redevelopment, including any application under the regulations of the NJMC (specifically N.J.A.C. 19:4-1.1 *et seq.*, and 19:5-1.1 *et seq.*) of any parcel of land larger than 20,000 square feet may be approved by the NJMC or the Municipal Defendants, acting either through

their Planning Boards or Zoning Boards of Adjustment, without prior approval of the Court. Prior court approval is not necessary for the approval of any application involving minor applications for existing uses related to already developed properties, such as the addition of rooms or decks to existing housing, modifications of an existing commercial or industrial site for continuation of existing uses, or minor subdivisions of land which do not result in any new structures or uses. All other applications for development or redevelopment, not otherwise exempt under this Order, shall require the prior approval of the Court before any land use approvals may be granted by the Municipal Defendants' Planning Boards or Zoning Boards or the NJMC.

b. Notwithstanding the provisions of Paragraph 7.a above, an application for final site plan or subdivision approval shall be automatically exempted from the restraints on the development and redevelopment of land as set forth in this Order and shall not be required to apply for relief from this Order under the provisions set forth in Paragraph 8 provided that the application for final site plan or subdivision approval only seeks to ensure that the ordinance standards for final approval have been complied with and the conditions of the preliminary approval have been complied with subject to minimal deviations as set forth in N.J.S.A. 40:55D-50.a.

*Appendix C*

8. Applications for relief from any of the aforementioned scarce resource restraints shall be made as follows:

a. A full and complete description of the resource being sought to be released, along with the justification for the release of such resource shall be provided to the court-appointed Master and all parties to this litigation. An inclusionary or contributory affordable housing development, such as that sought by Tomu would be appropriate for such release.

b. The court-appointed Master may request such additional information as necessary in order to fully understand the nature of the relief requested and the impact such request would have on the production of affordable housing within Carlstadt and East Rutherford.

c. Within thirty days following receipt of all necessary information, the court-appointed Master shall supply to the Court, all parties in the litigation and anyone requesting such relief a copy of a report and recommendation, setting forth, in detail, the Master's position with respect to any release of any said resource.

d. The entity seeking release of such restraints shall thereafter file a motion on notice of all parties in this litigation for said relief with the Court, which has jurisdiction to allocate or withhold the requested relief. Notwithstanding the foregoing, if the Master recommends that the resource be released and no party

in the litigation filed an objection with the Master, a formal motion shall not be required, and the entity seeking such restraints shall submit an Order to the Court and to all parties in this litigation under the five-day rule.

e. All costs for such requested relief, production of the Master's report, and court costs shall be borne by the entity seeking to obtain such relief. No such relief can be granted if in the determination of the Court, granting the relief will impede the construction of the Municipal Defendants' fair share of affordable housing units.

9. a. Any development and/or redevelopment project located within the jurisdiction of the New Jersey Sports and Exposition Authority shall be exempt from this Order and is not required to apply for relief from this Order under the procedures set forth in paragraph 8.

b. Any development and/or redevelopment project located on Block 104, Lots 1, 1.01, 1.02, 2 and 3 in the Borough of East Rutherford shall be exempt from this Order and is not required to apply for relief from this Order under the procedures set forth under the procedures set forth in paragraph 8.

10. A copy of this Order shall be served upon all counsel of record within seven (7) days of the date hereof.

s/ Jonathan N. Harris
HON. JONATHAN N. HARRIS, J.S.C.

## APPENDIX D — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY FILED NOVEMBER 28, 2005

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5894-03

*Civil Action*

ORDER

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

v.

BOROUGH OF CARLSTADT, PLANNING BOARD OF CARLSTADT and NEW JERSEY MEADOWLANDS COMMISSION,

Defendants.

---

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. BER-L-5895-03

*Civil Action*

ORDER

TOMU DEVELOPMENT CO., INC.,

Plaintiff,

*Appendix D*

v.

BOROUGH OF EAST RUTHERFORD, PLANNING BOARD OF EAST RUTHERFORD and the NEW JERSEY MEADOWLANDS COMMISSION,

Defendants.

**THIS MATTER** coming on for trial before the Honorable Jonathan N. Harris on August 8th and 9th, 2005, September 26th, 27th, 28th and 29th, 2005 and November 2nd and 3rd, 2005, in the presence of Thomas Jay Hall, Esq. and Robert Kasuba, Esq. of the firm of Sills, Cummis, Epstein & Gross, P.C., attorneys for plaintiff Tomu Development Co., Inc. ("plaintiff" or "Tomu"); Richard J. Allen, Jr., Esq. of the firm of Kipp & Allen, LLP, attorney for defendants Borough of Carlstadt and Planning Board of Carlstadt; Beverly M. Wurth, Esq. of the firm of Calo Agostino, P.C., attorney for defendants Borough of East Rutherford and Planning Board of East Rutherford; and Robert L. Gambell, Esq., Deputy Attorney General (Peter C. Harvey, Attorney General), attorney for defendant New Jersey Meadowlands Commission ("NJMC"), upon plaintiff's Complaint for a builder's remedy pursuant to *Southern Burlington County NAACP v. Mount Laurel Township*, 92 N.J. 158 (1983) (hereinafter "*Mount Laurel II*"), and the Court having previously entered an Order granting plaintiff's motion for partial summary judgment and determining that the land use ordinances and regulations of Carlstadt and East Rutherford are unconstitutional under *Mount Laurel*

*II*, and the Court having rendered a written decision on November 10, 2005, the provisions of which are incorporated herein by reference, and good cause appearing:

IT IS on this 28 day of November, 2005:

ORDERED as follows:

1. Plaintiff is determined to be entitled to a builder's remedy pursuant to the decision in *Mount Laurel II*, and its lands in East Rutherford and Carlstadt may be developed with a mixed use project as follows:

> The development in East Rutherford shall consist of no more than 420 residential units consisting of 360 market rate units and 60 affordable rental units, plus no more than 420 residential units consisting of 340 market rate units and 80 affordable rental units in Carlstadt. These units shall be located in two midrise buildings which height shall not exceed the lesser of Federal Aviation Administration elevation guidelines or 230 feet. All dimensional requirements of the NJMC shall be satisfied, as must all applicable requirements of the Residential Site Improvement Standards found in *N.J.A.C.* 5:21-1, *et seq.* In addition, there shall be no more than 38,000 square feet of "ancillary development" that shall include limited commercial facilities (such as a dry cleaner or

convenience store), recreational facilities, public safety facilities, and meeting rooms. The development shall include a marina available to the public, to be overseen by the NJMC, but reserving five berths for the development or its residents. Tomu shall construct a riverwalk promenade, plus public parking, to allow access to the Hackensack River by members of the public, all as directed by the NJMC and in accordance with applicable law. The development shall comply with all other rules and regulations of the NJMC that are not inconsistent with this builder's remedy. Finally, the development shall comply with all Federal and local statutes, regulations, development regulations or ordinances that may apply and shall also comply with all other State laws including, but not limited to, the Fair Housing Act, *N.J.S.A.* 52:27D-301 *et seq.*; Freshwater Wetlands Protection Act, *N.J.S.A.* 13:9B-1 *et seq.*; the Endangered and Nongame Species Conservation Act, *N.J.S.A.* 23:2A-1 *et seq.*; the Water Supply Management Act, *N.J.S.A.* 58:1A-1 *et seq.*; the Water Pollution Control Act, *N.J.S.A.* 58:10A-1 *et seq.*; the Realty Improvement Sewerage and Facilities Act (1954), *N.J.S.A.* 58:11-23 *et seq.*; the Water Quality Planning Act, *N.J.S.A.* 58:11A-1 *et seq.*; the Safe Drinking Water Act, P.L. 1977, c.224, *N.J.S.A.* 58:12A-1 *et seq.*; the Flood Hazard Area Control Act, *N.J.S.A.* 58:16A-50 *et seq.*, and all implementing rules.

2. The land use regulations of Carlstadt and East Rutherford remain invalid and unconstitutional insofar as such provisions continue past exclusionary practices.

3. The Carlstadt and East Rutherford Planning Boards and the respective governing bodies of these Borough (hereinafter collectively "the municipal defendants") shall immediately prepare comprehensive compliance plans (including appropriate strategies to address the indigenous and unmet needs) for each municipality, together with zoning and planning legislation to satisfy the fair share obligations of rounds one and two, and the unmet need, all in accordance with regulations adopted by the Council On Affordable Housing ("COAH").

4. The municipal defendants shall draft meaningful Housing Element and Fair Share Plans, together with fee ordinances (if appropriate) and spending plans that are consonant with COAH rules.

5. The municipal defendants shall exercise planning discretion in deciding whether to employ a program of rehabilitation grants, regional contribution agreements, accessory apartments, mobile homes, overlay zones, or any other incentive devices to meet the fair share and unmet need.

6. The plans of the municipal defendants shall be completed, adopted and presented to the Court no later than February 28, 2006. In default thereof, *all* development regulations in East Rutherford and

Carlstadt, as the case may be, shall be permanently invalidated, and a scarce resource order enjoining *all* land use development applications in the defaulting Borough (whether before the Planning Board, Board of Adjustment or the NJMC) shall become automatically effective.

7. In the event the municipalities, or either of them, comply with the requirements hereinabove set forth, in such event the respective complying municipality will be entitled to a six (6) year judgment of repose commencing no earlier than February 28, 2006.

8. The Special Master shall regularly consult with designated representatives of both Boroughs and their Planning Boards and governing bodies during the preparation of the compliance plans and he shall provide appropriate input and constructive criticism throughout the process.

9. A copy of this Order shall be served by the Special Master upon all counsel of record within 5 days of the date hereof.

s/ Jonathan N. Harris
Jonathan N. Harris, J.S.C.

## APPENDIX E — ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING PETITION FOR CERTIFICATION FILED JANUARY 30, 2009

SUPREME COURT OF NEW JERSEY
C-560 September Term 2008
63, 269

TOMU DEVELOPMENT COMPANY, INC.,

Plaintiff-Respondent,

v.

BOROUGH OF CARLSTADT, and PLANNING BOARD OF CARLSTADT,

Defendants-Petitioners,

and

NEW JERSEY MEADOWLANDS COMMISSION,

Defendant-Respondent.

---

AND OTHER RELATED CASES

**ON PETITION FOR CERTIFICATION**

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-5512/5621/5741-05 having been submitted to this Court, and the Court having considered the same;

*Appendix E*

It is ORDERED that the petition for certification is denied, with costs; and it is further

ORDERED that the appeal filed in the within matter is dismissed pursuant to *Rule* 2:12-9.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 27th day of January, 2009.

s/ [illegible]

(2)

No. 08-1353

FILED
JUN 3 - 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

# Supreme Court of the United States

BOROUGH OF CARLSTADT and
PLANNING BOARD OF CARLSTADT,

*Petitioners,*

v.

TOMU DEVELOPMENT CO., INC., and the
NEW JERSEY MEADOWLANDS COMMISSION,

*Respondents.*

**On Petition For A Writ Of Certiorari
To The Superior Court Of
New Jersey, Appellate Division**

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## PARTIES TO THE PROCEEDING

Proceedings in the courts below included the following parties:

Tomu Development Co., Inc.
(Plaintiff/Respondent)

Borough of Carlstadt (Defendant/Petitioner)

Planning Board of the Borough of Carlstadt
(Defendant/Petitioner)

New Jersey Meadowlands Commission
(Defendant/Respondent)

The following were parties to consolidated trial court proceedings and to the Appellate Division's opinion; however, the appeals were not consolidated:

Borough of East Rutherford
(Defendant)

Planning Board of the Borough of East Rutherford
(Defendant)

## RULE 29.6 NOTATION

The respondent has no parent, and there are no publicly held companies that hold any stock of the respondent.

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Respondent Tomu Development Co., Inc. ("Tomu") respectfully requests that this Court deny the petition for a writ of certiorari.

The appointment of the Monitor to oversee the development and implementation of Carlstadt's land use regulations was necessary to ensure that Carlstadt would not directly or indirectly prohibit the development of new homes for low- and moderate-income households. In an e-mail, the Mayor of Carlstadt announced that he and his fellow Councilmembers were "overjoyed" at the possibility that they would be able to delay the development of affordable housing on Tomu's property for twenty years by raising various legal impediments. Based on this and other evidence, the state trial court and appellate court determined that Carlstadt's officials would use any means at their disposal to thwart new affordable housing opportunities within Carlstadt and that the appointment of a Monitor to oversee Carlstadt's land use process was necessary to ensure affordable housing would be built in Carlstadt.

Carlstadt's anti-affordable housing policies and practices violate New Jersey's Constitution. In *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel* ("*Mount Laurel II*"), 456 A.2d 390 (N.J. 1983), the New Jersey Supreme Court determined that developing municipalities have an obligation to create a realistic opportunity for their fair share of affordable housing. This obligation has been endorsed by the New Jersey Legislature, which in 1985 adopted the New Jersey Fair Housing Act, N.J. Stat. Ann.

§ 52:27D-301, *et seq.*, which created the New Jersey Council on Affordable Housing ("COAH"). COAH is the state agency responsible for adopting regulations to calculate each municipality's fair share of affordable housing and to govern the mechanisms available for municipalities to satisfy their fair share obligations. N.J. Stat. Ann. § 52:27D-307. New Jersey courts defer to COAH's calculations of a municipality's fair share obligations. *See Hills Dev. Co. v. Township of Bernards*, 510 A.2d 621 (N.J. 1986) (upholding the New Jersey Fair Housing Act).

In 1987, COAH adopted N.J. Admin. Code § 5:92, which is known as the "Round 1" substantive regulations and governed the time period from 1987 through 1993. In 1994, COAH adopted N.J. Admin. Code § 5:93, which is known as the "Round 2" substantive regulations and governed the time period from 1987 through 1999, thereby subsuming the fair share obligations imposed under Round 1. In 2004, COAH adopted N.J. Admin. Code § 5:94, which is known as the "original Round 3" substantive regulations, and which governed the time period from 1987 through 2014. COAH's original Round 3 regulations were substantially invalidated during the pendency of this litigation in *In re Adoption of N.J.A.C. 5:94*, 914 A.2d 348 (N.J. Super. Ct. App. Div. 2007). In 2008, COAH adopted N.J. Admin. Code § 5:97, which are COAH's "revised Round 3" substantive regulations and are currently on appeal before the New Jersey Superior Court, Appellate Division.

Carlstadt's fair share obligation, as determined by COAH, changed depending upon the regulations in effect at the applicable time period. At the time of trial, Carlstadt's fair share obligation for the development of new affordable housing units was 186 affordable housing units, *see* N.J. Admin. Code § 5:94, App. C, and its fair share obligation to rehabilitate affordable housing units was 12 affordable housing units.

In adopting its regulations, COAH was aware that some municipalities, such as Carlstadt, have land within the New Jersey Meadowlands Commission ("NJMC") District. COAH determined that Carlstadt, as every other municipality with land within the NJMC District, was responsible for the affordable housing on land within the NJMC District. *See* 26 N.J. Reg. 2300(a), 2345 (June 6, 1994).

The NJMC has primary land use authority for the adoption of land use regulations and the approval of development applications within the NJMC District. *See* N.J. Admin. Code § 13:17-1, *et seq.* However, Carlstadt has influence over the NJMC's land use regulations and the approval of development applications within the NJMC District through its position on the Hackensack Meadowlands Municipal Committee ("HMMC"). N.J. Stat. Ann. § 13:17-8. Furthermore, Carlstadt's officials have indirect authority over such matters under the well-recognized but unwritten practice that the NJMC will not adopt land use regulations or approve development applications against the wishes of the municipality where the development will occur.

Throughout this litigation, the NJMC has made it clear that it would approve the rezoning of and development of affordable housing units within the Carlstadt portion of the NJMC District, such as Tomu's property, if Carlstadt consented to such development. However, Carlstadt has steadfastly opposed such a development. Despite its clear obligations under COAH's regulations, Carlstadt failed to create a realistic opportunity for the development of any affordable housing units within its borders. Since at least 1980, no new affordable housing units have been developed in Carlstadt.

In *Mount Laurel II*, 456 A.2d at 452-54, the New Jersey Supreme Court effectively deputized developers to enforce the constitutional obligation for municipalities to create a realistic opportunity to develop their fair share of affordable housing by announcing that a developer would be awarded a "builder's remedy," *i.e.*, the right to develop its property at an increased density, if the developer establishes that the municipality was non-compliant with its affordable housing obligations and the developer makes a substantial contribution of affordable housing. A municipality could defeat a builder's remedy by establishing that the proposed development is clearly contrary to sound planning and environmental concerns. *See id.* at 452. The New Jersey Legislature created an administrative procedure whereby Carlstadt, as any other municipality, may voluntarily develop an affordable housing plan, known as a "Housing Element and Fair Share Plan," and petition COAH for "substantive certification." A municipality that

receives substantive certification is entitled to enhanced protection from builder's remedy litigation. *See* N.J. Stat. Ann. § 52:27D-317. *See generally* N.J. Admin. Code §§ 5:91 (Rounds 1 and 2 procedures), 5:95 (original Round 3 procedures), 5:96 (revised Round 3 procedures).

Despite the availability of substantive certification, Carlstadt never developed a compliant Housing Element and Fair Share Plan and never petitioned COAH for substantive certification. Carlstadt chose to remain vulnerable to a builder's remedy lawsuit, such as the one filed by Tomu in this case. Tomu filed litigation seeking a builder's remedy for its approximately 26.9-acre parcel of land that straddles the Borough of Carlstadt and the Borough of East Rutherford. Of those acres, approximately 8.9 acres are uplands and available to be developed consistent with the applicable environmental regulations.

The Tomu property is suitable for high density residential development. Among other proofs submitted on this issue at trial, in 1989, the NJMC approved variances and a special exemption related to the development of 350 residential units, with 20% of those units to be designated as affordable housing units, and a substantial non-residential component on the Tomu property. Due to the poor real estate market in the early 1990s, that project was not constructed. Later, Tomu attempted to gain municipal support for the development of other projects on the property, including a high density residential development with a substantial amount of affordable

housing. Carlstadt's officials were hostile to such a proposal. When Carlstadt's officials learned that Tomu proposed to develop residences on the portion of the Tomu property within Carlstadt, Carlstadt adopted a resolution authorizing it to take the Tomu property by eminent domain. Carlstadt has never moved forward with its condemnation action.

The trial court awarded a builder's remedy to Tomu for a total of 840 residential units, including 140 affordable housing units. Of those, 420 residential units and 80 affordable units are to be located in Carlstadt. Despite the prior approval of a substantial mixed use development on the Tomu site, Carlstadt continues its unsupportable assertion that the development of a high density residential development on the Tomu property is contrary to sound land use and planning due to its isolation from Carlstadt's established residential neighborhood. Carlstadt's commentary on this issue is not linked to any federal issue presented by Carlstadt in its petition, as Carlstadt has not petitioned this Court to reverse the builder's remedy awarded to Tomu. However, it is worth noting that Carlstadt's evidence on this issue at trial was so weak that the trial court rejected Carlstadt's planning expert's criticism of the development of the Tomu site as a "net opinion."

Following the trial court's award of the builder's remedy to Tomu, the trial court provided Carlstadt with one last chance to develop a compliant Housing Element and Fair Share Plan. The trial court warned that if Carlstadt defaulted on this, the trial court

would "permanently invalidate" Carlstadt's land use regulations and enjoin all development applications. (Pet. 61a-62a.)

Carlstadt submitted a woefully deficient Housing Element and Fair Share Plan. The court-appointed Special Master, who was later appointed to serve as Monitor, determined (Pet. 14a) that "Carlstadt did not make a good faith effort to comply" with their fair share obligations following the award of the builder's remedy. The state trial court (Pet. 36a) characterized Carlstadt's compliance efforts as a "thinly veiled half-baked offering." As a result, the trial court stripped Carlstadt of its land use authority and appointed a Monitor to develop a compliant Housing Element and Fair Share Plan and seek substantive certification from COAH. The trial court also prohibited Carlstadt's officials from acting as the official representatives of Carlstadt in their dealings with the NJMC.

The appellate court affirmed the trial court's decision in all respects, including the key factual finding that "East Rutherford and Carlstadt showed no inclination to voluntarily meet their affordable housing obligations." (Pet. 15a.) Carlstadt petitioned the New Jersey Supreme Court for certification, but the New Jersey Supreme Court denied certification.

## REASONS WHY THE PETITION SHOULD BE DENIED

### 1. The issues raised in Carlstadt's petition involve unique facts and circumstances that are peculiar to the parties and land use regulation within the State of New Jersey.

Carlstadt's petition involves a land use matter, which is well within the peculiar knowledge and expertise of the New Jersey courts. *See, e.g.*, *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 347 (2005) ("[S]tate courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical and legal questions related to zoning and land use regulations.").

The State of New Jersey controls the use of all of the land within it, and it delegated the authority to regulate the use of a portion of that land to Carlstadt. However, that delegation is conditioned on Carlstadt complying with the New Jersey Constitution by not engaging in exclusionary land use practices. By engaging in such exclusionary land use practices, Carlstadt breached the delegation of the state's authority to regulate the use of land. *See Mount Laurel II*, 456 A.2d at 415. As a direct result of that breach, the state trial court ordered Carlstadt to develop a compliant Housing Element and Fair Share Plan. (Pet. 61a-62a.) Because Carlstadt refused to develop a compliant Housing Element and Fair Share Plan within that time period, the state trial court was empowered to strip Carlstadt of its zoning authority and require the approval of specific development projects.

*See Mount Laurel II*, 456 A.2d at 455-58. Rather than exercise this power directly, the state trial court and appellate court determined that it was more appropriate to remove the zoning and land use authority from Carlstadt's officials, who made it clear that they would not voluntarily comply, and delegate that authority to the Monitor.

Given the peculiarities of New Jersey law on this issue, Carlstadt's petition does not raise issues that will have broad application beyond the immediate parties to the litigation, which is a relevant factor for the Court to consider in determining whether to grant certiorari. *See Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Carlstadt's petition points to no other state that has interpreted its state constitution as imposing similar affordable housing requirements. Carlstadt's petition points to no disagreement among state courts and federal courts on the remedial powers available to a court to enforce compliance. Therefore, the Court's review and decision on this matter would likely only impact municipalities and developers in New Jersey.

Even within New Jersey, many aspects of this litigation have only limited impact. At its core, the litigation involves Carlstadt's attempt to hide behind the jurisdiction of the NJMC to avoid its obligations under New Jersey's Constitution. Only fourteen of New Jersey's municipalities have land wholly or partially within the NJMC District.

Furthermore, the issues raised within Carlstadt's petition flow from the state trial court's factual determination that Carlstadt would continue to violate New Jersey's Constitution if it were permitted to do so. This is a unique occurrence, which compelled the state trial court to create a "novel" remedy of stripping Carlstadt of its zoning authority and appointing the Monitor. (Pet. 16a.) In the twenty-six years since *Mount Laurel II* was decided, there have been no other instances where a trial court has been compelled to issue such a remedy due to the recalcitrance of the municipality.

**2. There is no merit to the voting rights issue raised in Carlstadt's petition.**

Carlstadt extensively relies upon *Bush v. Gore*, 531 U.S. 98 (2000), which the Court made clear would not be precedential. Furthermore, because Carlstadt did not raise this issue below, this Court should not consider it in determining whether to grant certiorari. *See Howell v. Mississippi*, 543 U.S. 440 (2005).

Even assuming arguendo that Carlstadt sufficiently raised this issue below, Carlstadt, a municipal corporation, has no standing to assert an alleged violation of federal voting rights on behalf of its residents. *See United States v. Hays*, 515 U.S. 737, 742-43 (1995) (generally discussing standing for alleged violations of voting rights). Carlstadt does not cite to any legal authority granting it standing to assert such a claim on behalf of its residents.

Even further assuming arguendo that Carlstadt had standing to allege a voting rights violation in this matter, there has been no violation. The state trial court and appellate court decisions do not directly or indirectly regulate the right of Carlstadt's residents to vote for Mayor and Councilmembers. Rather, the trial court and appellate court decisions strip the Mayor and Councilmembers of some of their official authority.

This is a dispute between the State of New Jersey and Carlstadt, one of its municipalities, regarding who will act as Carlstadt's representative before the HMMC, a state-created commission. The State of New Jersey has the authority to control land use within its borders and it can delegate that authority as it deems appropriate. The State of New Jersey has decided to delegate some of that authority to the Borough of Carlstadt, as set forth in the Municipal Land Use Law, N.J. Stat. Ann. § 40:55D-1, *et seq.*, and some of that authority to the NJMC, as set forth in N.J. Admin. Code § 13:17-1, *et seq.* As part of this regulatory scheme, the New Jersey Legislature created the HMMC, *see* N.J. Stat. Ann. § 13:17-8, and permitted Carlstadt, along with the other municipalities with land within the NJMC, to influence the NJMC's land use decisions.

The State of New Jersey has the power to strip Carlstadt of its seat at the HMMC and to appoint whomever the state chooses. There is no federal constitutional right implicated in such disputes between municipalities and the state where they are located.

*See City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923).

### 3. There is no restraint on Carlstadt's officials from engaging in political speech that may be protected by the United States Constitution.

There are no facts supporting Carlstadt's claim that its officials have been denied the opportunity to engage in political speech protected by the United States Constitution. Both the trial court and the appellate court made clear that the Monitor has the authority to officially act on behalf of Carlstadt and to speak as the official voice of Carlstadt in matters involving the NJMC. As stated by the appellate court (Pet. 19a-20a), the appointment of the Monitor does not prohibit any resident of Carlstadt, including Carlstadt's elected representatives, from personally engaging in political speech. Carlstadt acknowledges (Pet. 21 n.3) that the appellate court determined that "a Carlstadt official may, in a personal (not official) capacity, freely speak before the NJMC." Carlstadt's officials are merely prevented from representing that their personal opinions are the official policies of Carlstadt. As a result, there is no restraint on political speech. There is only a restraint on official action to be undertaken by Carlstadt's officials.

This provision was necessary because Carlstadt's officials are determined not to comply with Carlstadt's affordable housing obligations. If Carlstadt's

officials were entitled to speak as the official voice of Carlstadt regarding these land use matters, they could thwart the development of affordable housing within Carlstadt's borders by using their influence over the policies of the NJMC and the HMMC.

**4. There was no violation of Carlstadt's due process rights under the United States Constitution.**

Carlstadt is a creature of the state, and Carlstadt does not have rights under the United States Constitution limiting the power of the state to delegate authority to them. *See City of Trenton*, 262 U.S. at 187. Carlstadt acknowledges this well-established rule but then asserts that Carlstadt is entitled to the fundamental fairness protections afforded by the Due Process Clause of the United States Constitution. Carlstadt has not presented any rationale for this Court to disturb the well-established rule the municipalities do not have due process rights under the United States Constitution.

Even assuming arguendo that Carlstadt has a constitutional right to due process, Carlstadt had reasonable notice that the court would assume responsibility over Carlstadt's land use regulations if Carlstadt did not prepare a compliant Housing Element and Fair Share Plan as ordered by the court. Since *Mount Laurel II* was decided in 1983, Carlstadt was on notice of its obligations to create a realistic opportunity for the development of its fair share of

affordable housing. When the trial court determined as a matter of law that its land use ordinances were constitutionally deficient, Carlstadt knew that it needed to remedy those deficiencies. Carlstadt never voluntarily undertook to remedy these deficiencies and waited for the trial court to order it to do so. In that order (Pet. 61a-62a), the trial court made clear that it would impose harsh sanctions if Carlstadt failed to comply. In *Mount Laurel II*, 456 A.2d at 455-58, the New Jersey Supreme Court made it clear that trial courts have broad remedial powers, including stripping municipalities of their zoning authority and requiring the approval of specific development projects. *See id.* at 455-58. Given the clear language set forth in *Mount Laurel II*, and the trial court's order, Carlstadt had adequate notice that the court could impose a remedy designed to ensure compliance with its obligations under the New Jersey Constitution. Therefore, there was no violation of the United States Constitution's due process protections.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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